SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 755.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JOSIAH V. THOMPSON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the District Court of the United States for the Western District of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States of America, plaintiff, and Josiah V. Thompson, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 26th day of October, A. D. 1918.

[SEAL.] J. WOOD CLARK, *Clerk.*

Allowed by
CHAS. P. ORR, *Judge.*

2 (Endorsed:) No. 17. March Term, 1918. Crim. D'k't. United States v. Josiah V. Thompson. Writ of Error.

3 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSIAH V. THOMPSON, DEFENDANT in error. } No. 17. March term, 1916.

Citation in error.

To JOSIAH V. THOMPSON, *greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Pennsylvania sitting at Pittsburg, wherein the United States of America is plaintiff in error, and you are defendant in

error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, judge of the District Court of the United States for the Western District of Pennsylvania, this 26 day of Oct., 1918.

CHAS. P. ORR,
Judge of the United States District Court
for the Western District of Pennsylvania.

4 Service of the foregoing citation is hereby acknowledged this 28 day of October, 1918.

JOSIAH V. THOMPSON.

5 (Endorsed.) No. 17. March T., 1916. In the District Court of the United States for the West. Dist. of Pennsylvania. United States, plaintiff in error, vs. Josiah V. Thompson, defendant in error. Citation in error. Filed Oct. 26th, 1918. J. Wood Clark, Clerk. R. L. Crawford, U. S. Attorney; John M. Henry, Assistant U. S. Attorney; Sylvester R. Rush, Special Assistant to Attorney General. Office of the Clerk, Supreme Court, U. S., received Nov. 21, 1918.

6 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
JOSIAH V. THOMPSON. } No. 17. March Term, 1916.

Indictment: Violation of banking laws. 1–20, wilful misapplication; 21–29, abstraction; 30, embezzlement. E. Lowry Humes, Attorney.

Mar. 24, 1916.	Presentment of grand jury asking for presentation of bill of indictment filed.
" " "	Order made directing presentation of bill or bills of indictment.
" " "	A true bill.
" " "	Indictment filed.
" " "	Certified copy of indictment issued to U. S. atty.
Apr. 28, "	Recognizance of defendant in the sum of ten thousand dollars for appearance of the September term of the U. S. Dist. Court.
Dec. 30, 1916.	Petition of defendant for postponement of trial, filed.
" " "	Petition of creditors for postponement of trial filed.
" " "	Petition of receivers for postponement of trial filed.
	Motion of defendant for continuance of case, filed.

Apr. 14, 1917. On petition of receivers, creditors protective committee and defendant, order made continuing trial of case to November term, 1917, and directing defendant to renew bond.

Oct. 16, 1917. Petition & order granting continuance to 2nd day of May term, 1918, filed & entered at No. 21 Nov. term, 1915, this docket.

Apr. 27, 1918. Motion of U. S. atty. & order granting subpœna duces tecum filed and entered. Subpœna issued.

May 3, 1918. Motion of U. S. atty. & order granting subpœna duces tecum filed and entered. Subpœna issued.

" 4, " Motion of U. S. atty. & order granting subpœna duces tecum filed and entered. Subpœna issued.

" 6, " Motion of U. S. atty. & order granting subpœna duces tecum filed and entered. Subpœna issued.

" 7, " Motion to quash indictment filed.

" " " Affidavits of George L. Dawson & Robert I. Patterson, filed.

" " " Motion to quash indictment argued, C. A. V.

" 8, " Transcript of proceedings sur motion to quash and courts ruling granting motion to quash filed & entered.

" " " Counsel for Government ask for continuance of case.

" " " Case continued by the court.

" 17, " Motion for rehearing & to vacate judgment quashing the indictment, filed and entered.

" " " Memorandum filed and entered granting a rule in the defendant to show cause why a rehearing should not be had of the motion to quash.

" 25, " Answer of defendant to rule to show cause why a rehearing should not be had of the motion to quash, filed.

" " " Order filed and entered on the said motion to quash, May 8, 1918, be suspended, vacated and set aside pending the argument, and disposition of the rule to show cause.

July 10, " Rule to show cause why a rehearing should not be had of motion to quash argued, C. A. V.

" " " Demurrer to motion to quash filed and entered.

Sept. 27, " Opinion filed and entered overruling the motion for rehearing of the motion to quash; overruling demurrer filed on behalf of the United States on July 10, 1918, to the motion to quash, and directing judgment to be entered upon the motion to quash.

7 Oct. 19, 1918. Order filed and entered directing that final judgment be entered as follows: First;

* * * that the motion for a rehearing of the motion to quash the indictment in the case is hereby dismissed, and the rule to show cause heretofore granted be and the same is hereby discharged; second, * * * that the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash be and the same is hereby overruled and dismissed; and third, it is hereby ordered and directed that final judgment be entered in this case on the motion to quash, the judgment of May 8th, 1918, having been suspended, vacated and set aside by the order of court of May 25, 1918, above referred to and that said indictment be quashed, and it is further ordered that the United States shall have thirty days from the date of the entry of this judgment to sue out a writ or error to review the matter in the Supreme Court of the United States.

" " " And now, Oct. 19th, 1918, pursuant to order of court this day filed and entered, final judgment sur motion to quash is hereby entered. J. Wood Clark, clerk.

Oct. 26, 1918. Petition of the United States for writ of error to the Supreme Court of the United States and order allowing same filed and entered.

" " " Assignments of error filed.

" " " Citation awarded and issued, writ of error issued.

" 28, " Service of citation accepted by Josiah V. Thompson.

Nov. 15, 1918. Præcipe re contents of record sur writ of error filed.

" 18, " Bill of exceptions signed, sealed, allowed and filed.

8 (Copy.)

Address reply to
"The Attorney General"
and refer to
initials and number.
A. B. B. C. W.

CBS–FBK.

DEPARTMENT OF JUSTICE,
Washington, D. C., March 17, 1916.

Mr. WRISLEY BROWN,
Special Assistant to the Attorney General,
Department of Justice.

SIR: Under authority of the act of Congress approved June 30, 1906 (34) Stat., 816), you are hereby specifically authorized and directed to conduct grand jury proceedings in the Western District of Pennsylvania, in the case of United States v. Josiah V. Thompson,

former president of the First National Bank of Uniontown, Pennsylvania, for violation of the national banking laws.

Respectfully,

T. W. GREGORY,
Attorney General.

Endorsed on back: Department letter authorizing Wrisley Brown to conduct grand jury proceedings. Filed March 20, 1916. J. Wood Clark, clerk.

9 In the District Court of the United States for the Western District of Pennsylvania. Of November term, A. D. 1915.

The grand jury of the United States of America, inquiring in and for the Western District of Pennsylvania, upon their oaths and solemn affirmations, respectively, do present:

That on the 15th day of October, 1914, and at divers times and dates prior thereto and thereafter, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, Josiah V. Thompson, unlawfully, knowingly, feloniously, and wilfully did misapply certain of the moneys, funds, and credits of the First National Bank of Uniontown, Pennsylvania, and did make and cause to be made certain false entries, both in the books of said bank and in certain reports made to the Comptroller of the Currency and in addition thereto did swear falsely in connection with certain of said reports made to the Comptroller of the Currency.

The aforesaid violations of law having come to the knowledge of the grand jury aforesaid through the evidence of certain witnesses sworn before us, the grand jury has made presentment as aforesaid of the same to the court, and further requests the court that the United States attorney be instructed to lay before said grand jury a bill or bills of indictment more particularly and at length setting forth said violations of law.

D. D. TORRY,
Foreman of the Grand Jury.

10 *Order.*

And now, to wit, February 4, 1916, the foregoing presented in open court, and ordered to be filed; and it is further ordered that the United States attorney prepare and present an indictment to the grand jury, as recommended.

PER CURIAM.

11 (Endorsed:) No. 21. Nov. Term, 1915. In the Dist. Court of the United States for the West. Dist. of Pennsylvania. United States of America vs. Josiah V. Thompson. Presentment.

12 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES OF AMERICA,
vs.
JOSIAH V. THOMPSON.
No. 17. March Term, 1916.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss.

We, the undersigned, do hereby acknowledge ourselves indebted to the United States of America in the penal sum of ten thousand dollars, lawful money of the United States to be levied of our goods and chattels, lands and tenements, to the use of said United States, and to which payment well and truly to be made, we and each of us do bind ourselves, our heirs, executors and administrators, and each and every of them, jointly and severally, firmly by these presents. And in the event of this recognizance being forfeited by the District Court of the United States for the Western District of Pennsylvania, we do hereby empower the United States attorney of said district, whoever he may be, or any assistant United States attorney of said district, to appear for us, and after one or more declarations filed, thereupon to confess judgment against us as of any term of the District Court of the United States for the Western District of Pennsylvania for the above sum, together with cost of suit and release of all errors and without stay of execution; and inquisition and extension upon any levy on real estate is hereby waived and condemnation agreed to, and the exemption of personal property from levy and sale of any execution hereon is also herby expressly waived and no benefit of exemption will be claimed under and by virtue of any exemption law now in force, or which may hereafter be passed.

Date at Pittsburgh, Pa., this 28th day of April A. D. 1916.

13 Now the condition of this recognizance is such, that if Josiah V. Thompson who has been indicted for violation of the national banking laws of the United States, particularly sections 5208, 5209, and 5392 of the Revised Statutes, shall be and appear at September term, 1916, of the District Court of the United States for the Western District of Pennsylvania, at Erie, Pa., on the 18th day of September, A. D. 1916, or such other time and place thereafter as said court mad direct at then and there to answer the above or any other charge or charges that may be then and there alleged against him and not depart the said place without leave, then this obligation to be void; otherwise to remain in full force and virtue.

JOSIAH V. THOMPSON.
FRANK E. MARKELL.
CHARLES H. GORLEY.
SAMUEL STERN.
PATRICK P. REYMER.
O. MINOR BOUGHNER.

Taken and acknowledged before me this 28th day of April, A. D. 1916.

[SEAL.] G. L. BERGER,
Deputy Clerk, U. S. Dist. Court, West. Dist., Pa.

Justification of surety.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Frank E. Murkell, proposing to become bail and surety for the defendant, and being duly sworn says:

1. I reside at Isabella Road, Connellsville Township, Fayette County, Pa., and am by occupation banker.

2. I am the owner in my own name and right of real estate situate in said Western District of Pennsylvania as follows, viz: A lot of ground, in size 53 & 130 feet, situate at corner of Pittsburgh and Peach Sts., city of Connellsville, county and State aforesaid, in said district, which is improved with the following buildings: A two and three story business block and a residence building, all occupied.

14 3. The said property was obtained by me by deed from Mrs. Murphe et al.

4. The deed is dated about year 1898, and is recorded in the office of the recorder register of Fayette County, in deed book, and the title is in my own name alone.

Also 8 lots of ground, in size each 40 x 120 feet, situate at Isabella Road, aforesaid which is improved with the following buildings: A two-story brick tile-roof dwelling. The said property was obtained by me by deed from Mrs. William A. Davidson. The deed is dated and is recorded in deed book in said Fayette County, and is in my own name alone.

5. I am not surety on any bond of any kind except as follows: None.

6. There are no judgments against me except as follows: None.

8. The county assessed value of said premises is: For current year: On first-mentioned piece, eighteen thousand dollars ($1,800.00); on second-mentioned piece, two thousand dollars ($2,000.00).

9. I am not negotiating or contemplating the sale of any of the above-described property.

15 10. I have carefully read the foregoing affidavit, and know it is correct.

FRANK E. MARKELL.

Sworn and subscribed before me this 28th day of April, 1916.

[SEAL.] G. L. BERGER,
Deputy Clerk, U. S. Dist. Court, West. Dist., Pa.

I hereby certify that the person subscribing the above and foregoing affidavit is personally known to me to be the person whose name is signed thereto and I hereby identify him as such.

C. G. LEWELLYN.

(Endorsed:) No. 17. March Term, 1916. Criminal Docket. United States District Court, Western District of Pennsylvania. The United States vs. Josiah V. Thompson. Recognizance of Bail. For September Term, 1916.

16 In the District Court of the United States for the Western District of Pennsylvania. Of November term A. D. 1915.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn and affirmed and charged, at the term of said court, now pending, upon their oaths and solemn affirmations, respectively, do present:

That on the fifteenth day of October, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was an officer, to wit, the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State and district aforesaid, under the laws of the United States; and that the said Josiah V. Thompson then and there was lawfully authorized as such officer of the said national banking association to certify checks drawn upon the same.

That he, the said Josiah V. Thompson, so being then and there such officer, to wit, the president of the said national banking association and authorized to certify checks drawn upon the same as aforesaid, by virtue of the official relation of the said Josiah

17 V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said national banking association and over the moneys, funds, and credits of the said national banking association on the said 15th day of October, A. D. 1914, then and there at the said city of Uniontown, in the county of Fayette, and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously certify and cause to be certified a certain check drawn upon and ad-

dressed to the said national banking association, signed by one Wm. S. Craft, treasurer of Fayette County, dated October 15, 1914, in the sum of one thousand fifty-two dollars and eighteen cents ($1,052.18) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and caused to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amout then and there specified in said check, to wit, the amount of one thousand fifty-two dollars and eighteen cents ($1,052.18) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew; and further that the said check was thereupon immediately delivered to the Commonwealth of Pennsylvania and the amount thereof in moneys, funds, and credits of the said national banking association was drawn from the said national banking association in due course of business upon the same check; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

18 SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the tenth day of November, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was an officer, to wit, the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State and district aforesaid, under the laws of the United States; and that the said Josiah V. Thompson then and there was lawfully authorized as such officer of the said national banking association to certify checks drawn upon the same.

That he, the said Josiah V. Thompson, so being then and there such officer, to wit, the president of the said national banking association and authorized to certify checks drawn upon the same as aforesaid, by virtue of the official relation of the said Josiah V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said national banking

association on the said tenth day of November, A. D. 1914, then and
there at the said city of Uniontown, in the county of Fayette,
19 and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously certify and cause to be certified a certain check drawn upon and addressed to the said national banking association, signed by one Wm. S. Craft, treasurer of Fayette County, dated November 10, 1914, in the sum of three thousand nine hundred forty-three dollars and eighty cents ($3,943.80) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew, and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and caused to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of three thousand nine hundred forty-three dollars and eighty cents ($3,943.80) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew; and further that the said check was thereupon immediately delivered to the Commonwealth of Pennsylvania and the amount thereof in moneys, funds, and credits of the said national banking association was drawn from the said national banking association in due course of business upon the same check; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

20 THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the tenth day of November, in the year of our Lord one thousand nine hundred and fourteen, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was an officer, to wit, the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association was theretofore organized and established and was then and there existing and in operation and doing business, under and by virtue of the laws of the United States concerning national banks; and that the said Joseph V. Thompson then and there was lawfully authorized as such officer of the said national banking association to certify checks drawn upon the same.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Josiah V. Thompson so

being such officer of the said national banking association and authorized to certify checks drawn upon the same as aforesaid, then and there, to wit, on the said tenth day of November, in the year of our Lord 1914, at and within the said city of Uniontown, in the county of Fayette, in the Western District of Pennsylvania aforesaid, unlawfully did wilfully, knowingly, and feloniously, as such officer certify a certain check which had on that day been drawn upon the said national banking association by one of its depositors and
21 dealers, to wit, one Wm. S. Craft, treasurer of Fayette County, for the payment, to the order of the Commonwealth of Pennsylvania, of the sum of $236.73—that is to say, a check of the tenor following:

W. S. Craft, Treasurer of Fayette County.

"No. 1906. UNIONTOWN, PA., *Nov., 1914.*

FIRST NATIONAL BANK of Uniontown, Pa.

Pay to the order of Commonwealth of Pennsylvania, two hundred thirty-six & 73/xx dollars.

$236.73. WM. S. CRAFT,
Treasurer of Fayette County."

before the amount of the check in this count of this indictment mentioned had been regularly entered to the credit of the said dealer upon the books of the said national banking association, and when, as he, the said Josiah V. Thompson, when so certifying the same as aforesaid, there well knew the said dealer at the time when said check was so certified, did not have on deposit with the said national banking association an amount of money equal to the amount specified in the said check; and further that the said check was thereupon immediately delivered to the Commonwealth of Pennsylvania and the amount thereof in moneys, funds, and credits of the said association was drawn from the said association in due course of business upon the same check; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

22 FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifteenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was an officer, to wit, the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of

Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association was theretofore organized and established and was then and there existing and in operation and doing business, under and by virtue of the laws of the United States concerning national banks; and that the said Josiah V. Thompson then and there was lawfully authorized as such officer of the said national banking association to certify checks drawn upon the same.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Josiah V. Thompson so being such officer of the said national banking association and authorized to certify checks drawn upon the same as aforesaid, then and there, to wit, on the said 15th day of December, in the year of our Lord 1914, at and within the said city of Uniontown, in the county of Fayette, in the Western District of Pennsylvania, aforesaid, unlawfully did wilfully, knowingly, and feloniously, as such officer certify a certain check which had on that day been drawn upon the said national banking association by one of its de-
23 positors and dealers, to wit, one Wm. S. Craft, treasurer of Fayette County, for the payment, to the order of the Commonwealth of Pennsylvania, of the sum of one thousand thirty-one dollars and forty cents ($1,031.40), that is to say, a check of the tenor following:

W. S. Craft, Treasurer of Fayette County.

"No. 1967. UNIONTOWN, PA., *Decr. 15th, 1914.*

FIRST NATIONAL BANK of Uniontown, Pa.

Pay to the order of the Commonwealth of Pennsylvania one thousand thirty-one & 40/xx ---------- dollars.

WM. S. CRAFT,

$1,031.40. *Treasurer of Fayette County.*"

before the amount of the check in this count of this indictment mentioned had been regularly entered to the credit of the said dealer upon the books of the said national banking association, and when, as he, the said Josiah V. Thompson, when so certifying the same as aforesaid, there well knew, the said dealer, at the time when said check was so certified, did not have on deposit with the said national banking association an amount of money equal to the amount specified in the said check; and further, that the said check was thereupon immediately delivered to the Commonwealth of Pennsylvania and the amount thereof in moneys, funds, and credits of the said association was drawn from the said association in due course of business upon the same check; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

24 FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present,

That on the fifteenth day of December, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State and district aforesaid, under the laws of the United States:

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, by virtue of the official relation of the said Josiah V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said national banking association and over the moneys, funds, and credits of the said national banking association on the said fifteenth day of December, A. D. 1914, then and there at the said city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, know-

25 ingly, wrongfully, unlawfully, and feloniously certify and cause to be certified a certain check drawn upon and addressed to the said national banking association, signed by one Wm. S. Craft, treasurer of Fayette County, dated December 15th, 1914, in the sum of nineteen dollars ($19.00) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew, and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and caused to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amount of nineteen dollars ($19.00) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

26 SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifteenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of

Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the County of Fayette, in the State and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, by virtue of the official relation of the said Josiah V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said national banking association and over the moneys, funds, and credits of the said national banking association on the said fifteenth day of December, A. D. 1914, then and there at the said city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly,

27 wrongfully, unlawfully, and feloniously certify and cause to be certified a certain check drawn upon and addressed to the said national banking association, signed by one Wm. S. Craft, treasurer of Fayette County, dated December 15th, 1914, in the sum of nine hundred fifty-eight dollars and fifty-three cents ($958.53) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew, and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and cause to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amount of nine hundred fifty-eight dollars and fifty-three cents ($958.53) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

28 SEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the nineteenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corpo-

rate, then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, by virtue of the official relation of the said Josiah V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said banking association and over the moneys, funds, and credits of the said national banking association on the said nineteenth day of December, A. D. 1914, then and there at the said city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously certify and cause to be certified a certain
29 check drawn upon and addressed to the said national banking association, signed by one Wm. S. Craft, treasurer of Fayette County, dated December 19th, 1914, in the sum of nine dollars and fifty cents ($9.50) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew, and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and caused to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amount of nine dollars and fifty cents ($9.50) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

30 EIGHTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of January, in the year of our Lord one thousand nine hundred and fifteen, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was

then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, by virtue of the official relation of the said Josiah V. Thompson as president of said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of the said national banking association and over the moneys, funds, and credits of the said national banking association on the said fifth day of January, A. D. 1915, then and there at the said city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously certify and cause to be certified a certain check drawn and addressed to the said national bank-
31 ing association, signed by one Wm. S. Craft, treasurer of Fayette County, dated January 5th, 1915, in the sum of fifteen dollars and thirty cents ($15.30) and payable to the order of the Commonwealth of Pennsylvania; that the said Wm. S. Craft, treasurer of Fayette County, who made, drew, and signed the said check as aforesaid, did not then and there, to wit, at the time said check was so certified and caused to be certified by the said Josiah V. Thompson, president of said national banking association, have on deposit with said national banking association an amount of money then and there equal to the amount of fifteen dollars and thirty cents ($15.30) in money, as he, the said Josiah V. Thompson, president of said national banking association as aforesaid, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

32 NINTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the thirty-first day of October, A. D. 1914, and at all times and dates hereinafter mentioned at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, on or about the thirty-first day of October, A. D. 1914, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously make a certain false entry in a book then and there belonging to and in use by the said national banking association in transacting its said banking business, which said book was then and there designated and known as "271 Tickler. F. N. B. Uniontown, Pa.," on the page of said book containing a column headed "October 31st, 1914," on the twenty-eighth line from the top of said page, and opposite the written word "Checks," and under date of October 31st, 1914, in figures, a copy of which said false
33 entry is as follows, to wit, "69 509 62," which said entry so made in said book as aforesaid, then and there purported to show and did in substance and effect indicate and declare that at the close of business on the thirty-first day of October, A. D. 1914, the total amount of checks and cash items in said banking association was sixty-nine thousand five hundred nine dollars and sixty-two cents ($69,509.62) whereas in truth and in fact at the close of business on the said thirty-first day of October, A. D. 1914, the total amount of checks and cash items held by said banking association amounted to a different and much larger sum, to wit, the sum of one hundred nine thousand five hundred nine dollars and sixty-two cents ($109,509.62) as he, the said Josiah V. Thompson, then and there well knew;

That the said Josiah V. Thompson, so being president of the said First National Bank of Uniontown in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, did then and there make the said false entry in the said book of the said First National Bank of Uniontown as aforesaid, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the agent appointed to examine the affairs of said national banking association, to wit, the Comptroller of the Currency, and any agent appointed or who might be appointed by the Comptroller of the Currency to examine the affairs of the said banking association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

34 TENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the thirty-first day of October, A. D. 1914, and at all times and dates hereinafter mentioned at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of

Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, on or about the thirty-first day of October, A. D. 1914, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully and feloniously make a certain false entry in a book then and there belonging to and in use by the said national banking association in transacting its said banking business, which said book was then and there designated and known as "271 Tickler. F. N. B. Uniontown, Pa.," on the page of said book containing a column headed "October 31st, 1914," on the twenty-seventh line from the top of said page, and opposite the written word "Specie," and under date of October 31st, 1914, in figures, a copy of which said false
35 entry is as follows, to wit, "23 578 75," which said entry so made in said book as aforesaid, then and there purported to show and did in substance and effect indicate and declare that at the close of business on the thirty-first day of October, A. D. 1914, the total amount of specie in said banking association was twenty-three thousand five hundred seventy-eight dollars and seventy-five cents ($23,578.75), whereas in truth and in fact at the close of business on the said thirty-first day of October, A. D. 1914, the total amount of specie held by said banking association amounted to a different and much smaller sum, to wit, the sum of three thousand five hundred seventy-eight dollars and seventy-five cents ($3,578.75), as he, the said Josiah V. Thompson, then and there well knew;

That the said Josiah V. Thompson, so being president of the said First National Bank of Uniontown in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, did then and there make the said false entry in the said book of the said First National Bank of Uniontown as aforesaid, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the agent appointed to examine the affairs of said national banking association, to wit, the Comptroller of the Currency, and any agent appointed or who might be appointed by the Comptroller of the Currency to examine the affairs of the said banking association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

36 ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the thirty-first day of October, A. D. 1914, and at all times and dates hereinafter mentioned at the city of Uniontown, in the

county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, on or about the thirty-first day of October, A. D. 1914, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously make a certain false entry in a book then and there belonging to and in use by the said national banking association in transacting its said banking business, which said book was then and there designated and known as "271 Tickler. F. N. B. Uniontown, Pa.," on the page of said book containing a column headed "October 31st, 1914," on the twenty-sixth line from the top of said page, and opposite the written words "Legal Tr.," and under date of October 31st, 1914, in figures, a copy of which said
37 false entry is as follows, to wit, "28 896 —," which said entry so made in said book as aforesaid, then and there purported to show and did in substance and effect indicate and declare that at the close of business on the thirty-first day of October, A. D. 1914, the total amount of legal tender in said banking association was twenty-eight thousand eight hundred ninety-six dollars ($28,896.00), whereas in truth and in fact at the close of business on the said thirty-first day of October, A. D. 1914, the total amount of legal tender held by said banking association amounted to a different and much smaller sum, to wit, the sum of eight thousand eight hundred and ninety-six dollars ($8,896.00) as he, the said Josiah V. Thompson, then and there well knew;

That the said Josiah V. Thompson, so being president of the said First National Bank of Uniontown in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, did then and there make the said false entry in the said book of the said First National Bank of Uniontown as aforesaid, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the agent appointed to examine the affairs of said national banking association, to wit, the Comptroller of the Currency, and any agent appointed or who might be appointed by the Comptroller of the Currency to examine the affairs of the said banking association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

38 TWELFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of November, in the year of our Lord one thousand nine hundred and fourteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and District aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That the said national banking association on the date last aforesaid, to wit, on the fifth day of November, A. D. 1914, made and transmitted to the Comptroller of the Currency of the United States of America, a certain written report of the condition of the said national banking association, as of the close of business on the thirty-first day of October, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there by law the duty of the said national banking association to make and transmit to the said comptroller, and was, to wit, one of the five reports then required by law to be made each year by every such national banking association, in accordance with the pro-

39 visions of section 5211 of the Revised Statutes of the United States, and which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking association as aforesaid, and attested by the signatures of three of the directors of the said national banking association;

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present;

That the said Josiah V. Thompson, so being president of the said national banking association on the said fifth day of November, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette, and State and district aforesaid, wilfully, knowingly, wrongfully, unlawfully, and feloniously made and caused to be made a certain false entry in the said report under the heading "Resources," on line numbered "2" and after the words and figures "Overdrafts, Secured, $30,069.26; Unsecured, $ none (see Schedule)," in figures following, to wit, "30,069.26," which said entry made and caused to be made as aforesaid, then and there purported to show and did in substance and effect indicate and declare that at the close of business on the said thirty-first day of October, A. D. 1914, the total amount of the overdrafts of the said national banking association was the sum of thirty thousand sixty-nine dollars and twenty-

six cents ($30,069.26), whereas in truth and in fact the overdrafts of the said national banking association on the said 31st day of October, A. D. 1914, amounted to a different and much larger sum, to wit, the sum of forty-nine thousand fifteen dollars and seventy-eight cents ($49,015.78), as he, the said Josiah V. Thompson, then and there well knew;

40 That the said Joseph V. Thompson, so being president of the said national banking association, as aforesaid, did then and there make and cause to be made, the said false entry in the said report of the said national banking association as aforesaid, well knowing the said entry was then and there false, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the said Comptroller of the Currency; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

41 THIRTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present;

That on the fifth day of January, in the year of our Lord one thousand nine hundred and fifteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson, was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That the said national banking association on the date last aforesaid, to wit, on the fifth day of January, A. D. 1915, made and transmitted to the Comptroller of the Currency of the United States of America, a certain written report of the condition of the said national banking association, as of the close of business on the thirty-first day of December, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there by law the duty of the said national banking association to make and transmit to the said comptroller, and was, to wit, one of the five reports then required by law to be made each year by every

42 such national banking association, in accordance with the provisions of section 5211 of the Revised Statutes of the United States, and which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking

association as aforesaid, and attested by the signatures of three of the directors of the said national banking association.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present;

That the said Josiah V. Thompson, so being president of the said national banking association on the said fifth day of January, A. D. 1915, then and there at the city of Uniontown, in the county of Fayette, and State and district aforesaid, wilfully, knowingly, wrongfully, unlawfully, and feloniously made and caused to be made a certain false entry in the said report under the heading "Resources" on line numbered "2" and after the words and figures "Overdrafts, secured, $51,684.78; unsecured, $none," in figures following, to wit, "51,684.78," which said entry made and caused to be made as aforesaid, then and there purported to show and did in substance and effect indicate and declare that at the close of business on the said thirty-first day of December, A. D. 1914, the total amount of the overdrafts of the said national banking association was the sum of fifty-one thousand six hundred eighty-four dollars and seventy-eight cents ($51,684.78), whereas in truth and in fact the overdrafts of the said national banking association on the said thirty-first day of December, A. D. 1914, amounted to a different and much larger sum, to wit, the sum one hundred nineteen thousand seventy-five dollars and fifty-nine cents ($119,075.59), as he, the said Josiah V. Thompson, then and there well knew;

43 That the said Josiah V. Thompson, so being president of the said national banking association as aforesaid, did then and there make and cause to be made the said false entry in the said report of the said national banking association as aforesaid, well knowing the said entry was then and there false, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the said Comptroller of the Currency; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

44 FOURTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present;

That on the fifth day of November, in the year of our Lord one thousand nine hundred and fourteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson, was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of

Pennsylvania, and district aforesaid, under the laws of the United States;

That the said national banking association on the date last aforesaid, to wit, on the fifth day of November, A. D. 1914, made and transmitted to the Comptroller of the Currency of the United States of America, a certain written report of the condition of the said national banking association, as of the close of business on the thirty-first day of October, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there by law the duty of the said national banking association to make and transmit to the said comptroller, and was, to wit, one of the five reports then required by law to be made each year by every such national banking association, in accordance with the provi-
45 sions of section 5211 of the Revised Statutes of the United States, and which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking association as aforesaid, and attested by the signatures of three of the directors of the said national banking association;

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present;

That the said Josiah V. Thompson, so being president of the said national banking association on the said fifth day of November, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette, and State and district aforesaid, wilfully, knowingly, wrongfully, unlawfully, and feloniously made and caused to be made a certain false entry in the said report under the heading "Liabilities" and opposite "Item 21" and after the words "Other bonds borrowed without furnishing collateral security for same" and "Other bonds borrowed for which collateral security was furnished," said entry being in the column headed "Insert word 'NONE' if no amount is to be entered at right," a copy of said false entry being as follows, to wit, "None," which said entry made and caused to be made as aforesaid, was then and there false and untrue in that it purported to show and did in substance and effect indicate and declare that at the close of business on October 31st, A. D. 1914, said banking association was not then and there the borrower of "other bonds," other than United States bonds, whereas in truth and in fact said banking association at the close of business on October 31st, A. D. 1914, was then and there the borrower of "other bonds," other than United States bonds, that is to say, that the said Josiah V. Thompson for and in behalf of said banking
46 association theretofore, to wit, on January 9th, 1914, had borrowed from one, John Ellsworth Hess, bonds of the Thompson-Connellsville Coke Company of the total par value of two hundred and ten thousand dollars ($210,000), of which said borrowed bonds said banking association was then and there, to wit, on October 31st, A. D. 1914, the borrower, and was using as collateral security for the benefit of said banking association, a portion of said bor-

rowed bonds of the par value of one hundred and fifty thousand dollars ($150,000), as he, the said Josiah V. Thompson, then and there well knew:

That the said Josiah V. Thompson, so being president of the said national banking association as aforesaid, did then and there make and cause to be made the said false entry in the said report of the said national banking association as aforesaid, well knowing the said entry was then and there false, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the said Comptroller of the Currency; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

47 FIFTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of January, in the year of our Lord one thousand nine hundred and fifteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one, Josiah V. Thompson was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States;

That the said national banking association on the date last aforesaid, to wit, on the fifth day of January, A. D. 1915, made and transmitted to the Comptroller of the Currency of the United States of America, a certain written report of the condition of the said national banking association, as of the close of business on the thirty-first day of December, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there by law the duty of the said national banking association to make and transmit to the said comptroller and was, to wit, one of the five reports then required by law to be made each year by every such national banking association, in accordance with the provisions of section 5211 of the Revised Statutes of the United States, and
48 which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking association as aforesaid, and attested by the signatures of three of the directors of the said national banking association;

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That the said Josiah V. Thompson, so being president of the said national banking association on the said fifth day of December, A. D. 1915, then and there at the city of Uniontown, in the county of Fayette, and State and district aforesaid, wilfully, knowingly, wrongfully, unlawfully, and feloniously made and caused to be made a certain false entry in the said report under the heading "Liabilities," opposite "Item 12," and after the words "Other bonds borrowed without furnishing collateral security for same," and "Other bonds borrowed for which collateral security was furnished," said entry being in the column headed "Insert word 'None' if no amount is to be entered at right," a copy of said false entry being as follows: "None," which said entry was then and there false and untrue in that it purported to show and did in substance and effect indicate and declare that at the close of business on December 31st, 1914, said banking association was not then and there the borrower of "other bonds," other than United States bonds, whereas in truth and in fact said banking association at the close of business on December 31st, A. D. 1914, was then and there the borrower of "other bonds," other than United States bonds, that is to say, that the said Josiah V. Thompson for and in behalf of said national banking association theretofore, to wit, on January 9th, A. D. 1914, had borrowed from one, John Ellsworth Hess, bonds of the
49 Thompson-Connellsville Coke Company of the total par value of two hundred and ten thousand dollars ($210,000.00), of which said borrowed bonds said banking association was then and there, to wit, on December 31st, A. D. 1914, the borrower, and was using as collateral security for the benefit of said banking association, a portion of said borrowed bonds of the par value of one hundred and fifty thousand dollars ($150,000.00); and he, the said Josiah V. Thompson for and in behalf of said banking association theretofore, to wit, on November 10th, A. D. 1914, had borrowed from one, T. B. Palmer, president of the United Fire Brick Company, bonds of the United Fire Brick Company of the par value of one hundred and twenty-five thousand dollars ($125,000.00); of which said borrowed bonds said banking association was then and there, to wit, on December 31, A. D. 1914, the borrower, and was using as collateral security for the benefit of said banking association the said bonds of the United Fire Brick Company borrowed as aforesaid; all of which, he, the said Josiah V. Thompson then and there well knew;

That the said Josiah V. Thompson, so being president of the said national banking association as aforesaid, did then and there make and cause to be made the said false entry in the said report of the said national banking association as aforesaid, well knowing the said entry was then and there false, with intent in him, the said Josiah V. Thompson, president as aforesaid, to deceive the said Comptroller of the Currency; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

50 SIXTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of November, in the year of our Lord one thousand nine hundred and fourteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States.

That the said national banking association on the date last aforesaid, to wit, on the fifth day of November, A. D. 1914, made and transmitted to the Comptroller of the Currency of the United States of America, a certain written report of the condition of the said national banking association, as of the close of business on the 31st day of October, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there by law the duty of the said national banking association to make and transmit to the said comptroller, and was, to wit, one of the five reports then required by law to be made each year by every such national banking association, in accordance with the provisions of sec-

51 tion 5211 of the Revised Statutes of the United States, and which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking association as aforesaid, and attested by the signatures of three of the directors of the said national banking association.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Josiah V. Thompson so being president of said national banking association on the said fifth day of November, in the year of our Lord one thousand nine hundred and fourteen, then and there at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, did then and there appear in his proper person before one Katherine Phillips, a notary public duly commissioned by the State of Pennsylvania, and properly authorized to administer oaths, and the said Josiah V. Thompson, president as aforesaid, did then and there take and subscribe an oath to the truth of certain statements and declarations of material matters contained in the said report of the said national banking association, before the said notary public, who had authority under the laws of the United States to administer the said oath, and which said oath was taken in a case wherein a law of the United

States authorized an oath to be administered; that the said certain statements and written declarations of material matters contained in the said report so certified, subscribed, and sworn to by the said Josiah V. Thompson as aforesaid were then and there false and untrue, as he, the said Josiah V. Thompson, president as aforesaid, then and there well knew;

52 That is to say, that on the day and date last aforesaid, the said Josiah V. Thompson, president of the said national banking association as aforesaid, unlawfully, wilfully, knowingly, feloniously, and contrary to what he believed to be true, did take and subscribe the said oath to the aforesaid written report of the condition of the said national banking association aforesaid as of the thirty-first day of October, A. D. 1914, which said written report of the condition of said national banking association so subscribed, certified, and sworn to as aforesaid purported to show the true condition of the said national banking association at the close of business on the said thirty-first day of October, A. D. 1914, and which said written report subscribed, certified, and sworn to by the said Josiah V. Thompson as aforesaid, was not in all material respects true according to his best knowledge and belief; that is to say, that the said written report of the said national banking association set forth, declared, and represented, inter alia, that the secured and unsecured overdrafts of the said national banking association then and there, to wit, at the close of business on the thirty-first day of October, A. D. 1914, amounted to $30,069.26, whereas in truth and in fact the said overdrafts on the day and date last aforesaid then and there amounted to a different and much larger sum, to wit, the sum of $49,015.78, all of which he, the said Josiah V. Thompson, president as aforesaid, then and there well knew.

And the written report of the said national banking association further set forth, declared, and represented, inter alia, under item 21

53 of the said report, that said national banking association was not then and there, to wit, at the close of business on the said 31st day of October, A. D. 1914, the borrower of bonds other than United States bonds, either with or without furnishing collateral security therefor, when in truth and in fact the said national banking association was then and there, to wit, at the close of business on the said thirty-first day of October, A. D. 1914, the borrower of bonds other than United States bonds, to wit, one hundred and fifty bonds of the Thompson-Connellsville Coke Company of the par value of one hundred and fifty thousand dollars ($150,000.00), all of which he, the said Josiah V. Thompson, president as aforesaid, then and there well knew;

And the said written report of the said national banking association further set forth, declared, and represented, inter alia, under the heading of "Liabilities of officers and directors" in a certain schedule on the back of said report, that the said Josiah V. Thompson, president as aforesaid, did not then and there, to wit, at the close of business on the said thirty-first day of October, A. D. 1914, have any

overdraft in his account in and with said national banking association, whereas in truth and in fact he, the said Josiah V. Thompson, president as aforesaid, then and there, to wit, at the close of business on the said thirty-first day of October, A. D. 1914, did have an overdraft in his account with the said national banking association, to wit, an overdraft amounting to the sum of fifteen thousand nine hundred fifty-nine dollars and ninety cents ($15,959.90), as he, the said Josiah V. Thompson then and there well knew, and the said written report of the said national banking association containing the declaration last aforesaid was not in all material respects true, and
54 the said schedule on the back of the said written report did not fully and correctly represent the true state of the several matter therein contained, to the best of his, the said Josiah V. Thompson's knowledge and belief, as declared, certified, and sworn to in his said oath, subscribed as aforesaid, all of which he, the said Josiah V. Thompson, then and there well knew;

And so, the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Josiah V. Thompson, president as aforesaid, at the time and place and in the manner aforesaid in a case wherein a law of the United States authorized an oath to be administered, did commit wilful and corrupt perjury; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

55 SEVENTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of January, in the year of our Lord one thousand nine hundred and fifteen, and at all times and dates hereinafter mentioned, at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, and within the jurisdiction of this court, one Josiah V. Thompson was president of a certain national banking association, to wit, The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, and district aforesaid, under the laws of the United States.

That the said national banking association on the date last aforesaid, to wit, on the fifth day of January, A. D. 1915, made and transmitted to the Comptroller of the Currency of the United States of America a certain written report of the condition of the said national banking association, as of the close of business on the thirty-first day of December, A. D. 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States, which said report was a report which it was then and there

by law the duty of the said national banking association to make and transmit to the said comptroller, and was, to wit, one of the five reports then required by law to be made each year by every such national banking association, in accordance with the provi-
56 sions of section 5211 of the Revised Statutes of the United States, and which said report was verified by the oath of the said Josiah V. Thompson, president of the said national banking association as aforesaid, and attested by the signatures of three of the directors of the said national banking association.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Josiah V. Thompson, so being president of said national banking association, on the said fifth day of January, in the year of our Lord one thousand nine hundred and fifteen, then and there at the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, did then and there appear in his proper person before one, Charles T. Cramer, a notary public duly commissioned by the State of Pennsylvania, and properly authorized to administer oaths, and the said Josiah V. Thompson, president as aforesaid, did then and there take and subscribe an oath to the truth of certain statements and declarations of material matters contained in the said report of the said national banking association, before the said notary public, who had authority under the laws of the United States to administer the said oath, and which said oath was taken in a case wherein a law of the United States authorized an oath to be administered; that the said certain statements and written declarations of material matters contained in the said report so certified, subscribed, and sworn to by the said Josiah V. Thompson as aforesaid, were then and there false and untrue, as he, the said Josiah V. Thompson, president as aforesaid, then and there well knew;

That is to say, that on the day and date last aforesaid, the
57 said Josiah V. Thompson, president of the said national banking association as aforesaid, unlawfully, wilfully, knowingly, feloniously, and contrary to what he believed to be true, did take and subscribe the said oath to the aforesaid written report of the condition of the said national banking association aforesaid as of the thirty-first day of December, A. D. 1914, which said written report of the condition of said national banking association so subscribed, certified, and sworn to as aforesaid purported to show the true condition of the said national banking association at the close of business on the said thirty-first day of December, A. D. 1914, and which said written report subscribed, certified, and sworn to by the said Josiah V. Thompson as aforesaid, was not in all material respects true according to his best knowledge and belief; that is to say, that the said written report of the said national banking association set forth, declared, and represented, inter alia, that the secured and unsecured overdrafts of the said national banking association then and there, to wit, at the close of business on the thirty-

first day of December, A. D. 1914, amounted to fifty-one thousand six hundred eighty-four dollars and seventy-eight cents ($51,684.78), whereas in truth and in fact the said overdrafts on the day and date last aforesaid then and there amounted to a different and much larger sum, to wit, the sum of one hundred nineteen thousand seventy-five dollars and fifty-nine cents ($119,075.59), all of which he, the said Josiah V. Thompson, president as aforesaid, then and there well knew.

And the written report of the said national banking association further set forth, declared, and represented, inter alia, under item 12 of the said report, that said national banking association was not then and there, to wit, at the close of business on the said thirty-
first day of December, A. D. 1914, the borrower of bonds
58 other than United States bonds, either with or without furnishing collateral security therefor, when in truth and in fact the said national banking association was then and there, to wit, at the close of business on the said thirty-first day of December, A. D. 1914, the borrower of bonds other than United States bonds, to wit, one hundred and fifty bonds of the Thompson-Connellsville Coke Company of the par value of one hundred and fifty thousand dollars ($150,000.00), and also one hundred and twenty-five bonds of the United Fire Brick Company of the par value of one hundred and twenty-five thousand dollars ($125,000.00), all of which he, the said Josiah V. Thompson, president as aforesaid, then and there well knew;

And so, the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Josiah V. Thompson, president as aforesaid, at the time and place and in the manner aforesaid in a case wherein a law of the United States authorized an oath to be administered, did commit wilful and corrupt perjury; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

E. LOWRY HUMES,
United States Attorney.

Certified from the record this 4th day of April, A. D. 1916, as a true copy.

[SEAL.]

J. WOOD CLARK,
Clerk, U. S. District Court,
Western District of Penn'a.

59 (Endorsed:) No. 21. Nov. term, 1915. Crim. Docket. No. — United States District Court, Western District of Pennsylvania. The United States vs. Josiah V. Thompson. Indictment for 1–8, unlawfully certifying checks against overdrawn account; 9–11, false entries in books of bank; 12–15, false entries in reports to comptroller; 16–17, wilful & corrupt perjury. A true bill. D. D. Torry, foreman grand jury. Filed Feby. 8th, 1916.

J. Wood Clark, clerk. E. Lowry Humes, U. S. attorney. Neil W. McGill, Asst. U. S. attorney.

Form No. 168.

Back or cover of indictment with plea and judgment. Witnesses: S. J. Feather, Francisco Galica, Jasper Augustin,√ Virginia Marshall,√ W. S. Craft,√ Thos. D. Bailes,√ O. P. Powell,√ John Ellsworth Hess,√ T. B. Seamans,√ T. D. Bliss,√ T. P. Palmer, Catherine Phillips,√ Charles T. Cramer,√ W. B. Beeson, William Hunt,√ James H. Hoover,√ W. A. Stone,√ E. S. Hackney,√ F. M. Seamans, jr.,√ [first initial obliterated] H. Strawn, James C. Whaley.√

Above witnesses whose names are checked sworn by me this 4 day of February, 1916.

D. D. TORRY,
Foreman.

60 In the District Court of the United States, for the Western District of Pennsylvania. Of March term, A. D. 1916.

The grand jury of the United States of America, now inquiring in and for the Western District of Pennsylvania, upon their oaths and solemn affirmations, respectively, do present:

That on the 15th day of October, 1914, and at divers times and dates prior thereto and thereafter, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, then president of The First National Bank of Uniontown, did wilfully misapply and abstract certain of the moneys, funds and credits of the said First National Bank of Uniontown, Pennsylvania.

The aforesaid violations of law having come to the knowledge of the grand jury aforesaid through the evidence of certain witnesses sworn before us, the grand jury has made presentment as aforesaid of the same to the court, and further requests the court that the United States attorney be instructed to lay before this grand jury a bill or bills of indictment more particularly and at length setting forth said violations of law.

(Signed) GEORGE L. DAWSON,
Foreman of the Grand Jury.

61 *Order.*

And now, to wit, March 24, 1916, the foregoing presented in open court, and ordered to be filed; and it is further ordered that the United States attorney prepare and present an indictment or indictments to the grand jury, as recommended.

PER CURIAM.

62 *Section 5209, R. S.*

In the District Court of the United States for the Western District of Pennsylvania. Of March term, A. D. 1916.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn and affirmed and charged, at the term of said court, now pending, upon their oaths and solemn affirmations, respectively, do present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the seventh day of November, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of eleven hundred fifty-seven dollars and forty-six cents ($1,157.46),

63 a more particular description of said moneys, funds and credits being to the grand jurors unknown, cannot be herein set forth, and the said moneys, funds and credits aforesaid were misapplied in the manner and by the means following, that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which the said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association and over the affairs of said national banking association, did then and there pay and cause to be paid a certain check drawn upon said banking association by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

W. S. CRAFT,
Treasurer of Fayette County.

"No. 1903. UNIONTOWN, PA, *Nov. 7,*" *1914.*

FIRST NATIONAL BANK of Uniontown, Pa.

Pay to the order of E. S. Hackney cash
eleven hundred fifty-seven and 46/100 dollars.
$1,157.46 WM. S. CRAFT,
Treasurer of Fayette County.

Paid Nov. 7, 1914.
First Nat'l Bank,
Uniontown, Pa.
Endorsements:

Cash	1,000.
Orders	157. 46
	$1, 157. 46

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association and without the knowledge and consent of said banking association and its board of directors, which said sum so drawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking asso-
64 ciation, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds and credits whatever, and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of twenty-three thousand seventeen dollars and fifty-eight cents ($23,017.58), all of which he, the said Josiah V. Thompson, then and there well knew, and the said moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson, to injure and defraud said banking association, all of which he, the said Josiah V. Thompson, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

65 SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the tenth day of November, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply

certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of thirty-nine hundred forty-three dollars and eighty cents ($3943.80), a more particular description of said moneys, funds, and credits being to the grand jurors unknown cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means following; that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which the said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, and over the affairs of said national banking asso-
66 ciation, did then and there pay and cause to be paid a certain check drawn upon said banking association by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

W. S. Craft,
Treasurer of Fayette
County.

"No. 1904. UNIONTOWN, PA., *Nov. 10, 1914.*

FIRST NATIONAL BANK OF UNIONTOWN, PA.

Pay to the order of Commonwealth of Pennsylvania three thousand nine hundred forty three & 80/100 Dollars.

$3943.80. WM. S. CRAFT,
Treasurer of Fayette County.

Good when properly endorsed,
F. M. Semans, jr., Asst. Cashier.

Paid Nov. 13, 1914.
First Nat'l Bank,
Uniontown, Pa.

Endorsements:

For deposit in the Farmers Deposit National Bank, Pittsburgh, Penna., to the credit of Commonwealth of Penna.
R. K. YOUNG,
State Treasurer.

This check is received in lieu of cash due the Commonwealth and must be paid in New York or Philadelphia exchange without rebate."

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association and without the knowledge and consent of said banking association, and its board of directors, which said sum so drawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds, and credit whatever, and in
67 fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking asso-

ciation in the sum of twenty-four thousand two hundred fifty dollars and seventy-three cents ($24,250.73), all of which he, the said Josiah V. Thompson then and there well knew, and the said moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

68 THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the eighteenth day of November, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association, then and there, a body corporate, known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established was, then and there, existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of three thousand eight hundred and eighty-nine dollars and fifty cents ($3,889.50), a more particular description of said moneys, funds, and credits being to the grand jurors unknown, cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means following—that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which the said Josiah V. Thompson possessed over the moneys, funds, and credits of said
69 banking association, and over the affairs of said national banking association, did then and there pay and cause to be paid a certain check drawn upon said banking association by Wm. S.

Craft, treasurer of Fayette County, a copy of which said check is as follows:

W. S. Craft,
Treasurer of Fayette
County.

"No. 1914. Uniontown, Pa., *Nov. 18", 1914.*

First National Bank of Uniontown, Pa.

Pay to the order of E. S. Hackney, cash
thirty-eight hundred eighty nine and 50/100 dollars.
$3,889.50. Wm. S. Craft,
Treasurer of Fayette County.

Paid Nov. 18, 1914.
First Nat'l Bank,
Uniontown, Pa.

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association, which said sum so drawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds, and credits whatever, and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of twenty-one thousand seven hundred seventy-seven dollars and fifty-one cents ($21,777.51), all of which he, the said Josiah V. Thompson, then and there well knew, and the said moneys, funds, and credits aforesaid were then
70 and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson, to injure and defraud said banking association, all of which he, the said Josiah V. Thompson, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

71 FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the twenty-seventh day of November,

in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate known and designated as the First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of eight hundred fifteen dollars and ninety-five cents ($815.95), a more particular description of said moneys, funds, and credits being to the grand jurors unknown, cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means following; that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, did then and there pay and cause to be paid a certain
72 check drawn upon said banking association by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

"No. 1923. UNIONTOWN, PA., *Nov. 27, 1914.*

FIRST NATIONAL BANK OF UNIONTOWN, PA.

Pay to the order of E. S. Hackney, cash. eight hundred fifteen and 95/100 dollars.

$815.95. WM. S. CRAFT,
Treasurer of Fayette County.

Paid Nov. 27, 1914.
First Nat'l Bank,
Uniontown, Pa.

W. S. CRAFT,
Treasurer of Fayette
County.

Endorsements:

Orders 315.95
Cash 500.

$815.95

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association, which said sum so drawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said sanking association, and the said Wm. S.

Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds, and credits whatever; that the repayment of said sum to the said national banking association was not then and there in any way or manner secured; and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of thirty-one thousand one hundred twenty-nine dollars and seventy-two cents ($31,129.72), all
73 of which he, the said Josiah V. Thompson then and there well knew, and the said moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson, and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

74 FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district heretofore, to wit, on the third day of December, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate, known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply to the loss of said banking association, certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of four hundred twenty-three dollars and eighty-nine cents ($423.89), a more particular description of said moneys, funds, and credits being to the grand jurors unknown cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means follow-

ing—that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which the said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, did then and there pay and cause to be
75 paid a certain check drawn upon said banking association by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

W. S. Craft,
Treasurer of Fayette
County.

"No. 1940. UNIONTOWN, PA., *Dec., 1914.*

FIRST NATIONAL BANK of Uniontown, Pa.

Pay to the order of E. S. Hackney, cash.
four hundred twenty-three & 89/100 dollars.
$423.89. WM. S. CRAFT,
Treasurer of Fayette County.

Paid Dec. 3–1914.
First Nat'l Bank,
Uniontown, Pa.

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association, which said sum so drawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association, any moneys, funds, and credits whatever; that the repayment of said sum to the said national banking association was not then and there in any way or manner secured, and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of forty thousand three hundred six dollars and fifty-two cents ($40,306.52), all of which he, the said Josiah V. Thompson then and there well knew, and the said
76 moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the

act of Congress in such case made and provided and against the peace and dignity of the United States of America.

77 SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the seventh day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply to the loss of said banking association, certain of the moneys, funds, and credits of said national banking association to the amount and of the value of twenty-two hundred forty-four dollars and eight cents ($2244.08), a more particular description of said moneys, funds, and credits being to the grand jurors unknown, cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means following, that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, did then and there pay and cause to be paid a certain check drawn upon said banking association by Wm. S. Craft, treas-

78 urer of Fayette County, a copy of which said check is as follows:

"No. 1943. UNIONTOWN, PA., *Dec.* *1914.*

FIRST NATIONAL BANK OF UNIONTOWN, PA.

Pay to the order of E S Hackney, cash, twenty two hundred forty four & 08/100 dollars.

$2244.08. WM. S. CRAFT,
Treasurer of Fayette County.

Paid Dec. 7, 1914.
First Nat'l Bank,
Uniontown, Pa.

W. S. Craft,
Treasurer of Fayette
County.

Endorsements:

Orders 744.08
Cash 1500

2244.08"

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then

and there belonging to and being the property of said banking association, which said sum so drawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds, and credits whatever; that the repayment of said sum to said banking association was not then and there in any way or manner secured, and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of forty-three thousand three hundred ninety-four dollars and thirty-three cents ($43,394.33), all of which he, the said Josiah V. Thompson then and there well knew, and the said
79 moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the use, benefit, and advantage of the said Josiah V. Thompson and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

80 SEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the tenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply, to the loss of said banking association, certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and

credits to the amount and of the value of seventeen hundred seven dollars and twenty-six cents ($1,707.26), a more particular description of said moneys, funds, and credits being to the grand jurors unknown cannot be herein set forth, and the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virtue of the power of control, direction, and management which said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, did then and there pay and cause to be paid a certain check drawn upon said banking associa-
81 tion by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

W. S. Craft,
Treasurer of Fayette
County.

"No. 1959. UNIONTOWN, PA., *Decr. 10, 1914.*

FIRST NATIONAL BANK OF UNIONTOWN, PA.

Pay to the order of E S Hackney, cash, seventeen hundred seven and_____26/100 dollars.

$1,707.26. WM. S. CRAFT,
Treasurer of Fayette County.

Paid Dec. 10, 1914.
First Nat'l Bank,
Uniontown, Pa.

Endorsements:

Cash	500.
Orders	1,207.26
	$1,707.26"

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association, which said sum so drawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association, any moneys, funds, and credits whatever; that repayment of the said sum so drawn was not then and there in any way or manner secured to said banking association; and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there overdrawn in said banking association in the sum of forty-six thousand seven hundred twenty-six dollars and sixty-six cents
82 ($46,726.66), all of which he, the said Josiah V. Thompson then and there well knew, and the said moneys, funds, and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and to the advantage of the said Josiah V. Thompson and divers other

persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

83 EIGHTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Josiah V. Thompson, late of said district, heretofore, to wit, on the fourteenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, being then and there the president and agent of a certain national banking association then and there a body corporate, known and designated as The First National Bank of Uniontown, which said banking association having been theretofore created, organized, and established, was then and there existing and carrying on a banking business under the laws of the United States relating to national banking associations, at Uniontown, in the county and district aforesaid, unlawfully, fraudulently, knowingly, and feloniously did wilfully misapply to the loss of said banking association, certain of the moneys, funds, and credits of said banking association, to wit, moneys, funds, and credits to the amount and of the value of seven hundred eighty-two dollars and seven cents ($782.07), a more particular description of said moneys, funds, and credits being to the grand jurors unknown, cannot be herein set forth, and the said moneys, funds, and credits aforesaid were misapplied in the manner and by the means following—that is to say, that the said Josiah V. Thompson being then and there the president and agent as aforesaid, and by virture of the power of control, direction, and management which the said Josiah V. Thompson possessed over the moneys, funds, and credits of said banking association, did then and there pay and cause to be

84 paid a certain check drawn upon said banking association by Wm. S. Craft, treasurer of Fayette County, a copy of which said check is as follows:

"No. 1963. UNIONTOWN, PA., *Decr 14, 1914.*

FIRST NATIONAL BANK of Uniontown, Pa.

Pay to the order of E. S. Hackney, cash.
Seven hundred eighty-two and 07/100 dollars.
$782.07. WM. S. CRAFT,
Treasurer of Fayette County.

Paid Dec. 14, 1914.
First Natl Bank,
Uniontown, Pa.
Endorsements:

Orders 282.07
Cash 500.
782.07"

W. S. CRAFT,
Treasurer of Fayette County.

and the said check was paid and caused to be paid by the said Josiah V. Thompson from and out of the moneys, funds, and credits then and there belonging to and being the property of said banking association, which said sum so drawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, and the said Wm. S. Craft, treasurer of Fayette County, on the day and date aforesaid, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association and there was not then and there due and owing to him, the said Wm. S. Craft, treasurer of Fayette County, from said banking association any moneys, funds, and credits whatever; that the repayment of the said sum so drawn was not then and there in any way or manner secured to said national banking association; and in fact the account of the said Wm. S. Craft, treasurer of Fayette County, was then and there over-
85 drawn in said banking association in the sum of fifty thou-sand four hundred seventy-five dollars and sixty-five cents ($50,475.65), all of which he, the said Josiah V. Thompson then and there well knew, and the said moneys, funds and credits aforesaid were then and there wilfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette, County, and to the use, benefit, and advantage of the said Josiah V. Thompson, and divers other persons whose names being to the grand jurors unknown cannot be herein set forth, and he, the said Josiah V. Thompson, wilfully misapplied said moneys, funds, and credits as aforesaid with the intent then and there on the part of him, the said Josiah V. Thompson to injure and defraud said banking association, all of which he, the said Josiah V. Thompson then and there well knew; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

86 NINTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the eighteenth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said eighteenth day of December, A. D. 1914, at the city of Uniontown, in the county of Fayette and the State and district aforesaid, did, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand
87 jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, and its board of directors, and for the use, benefit, and advantage of the said Josiah V. Thompson and for the use, benefit, and advantage of one, Wm. S. Craft, treasurer of Fayette County, and for the use, benefit, and advantage of divers other persons to the grand jurors unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of nine hundred twenty dollars and sixty-four cents ($920.64) a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following; that is to say, on the said eighteenth day of December, A. D. 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain moneys, funds, and credits of the said national banking association and converted the same to the use, benefit, and advantage of him the said Josiah V. Thompson, and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers other persons to the grand jurors aforesaid unknown, to wit, the sum of nine hundred twenty dollars and sixty-four cents ($920.64) then and there belonging to and being the property of the said national banking association, by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn upon the addressed to the said national banking asso-
88 ciation by the said Wm. S. Craft, treasurer of Fayette County, dated December, 1914, and payable to the order of one, E. S. Hackney, cashier, in the sum of nine hundred twenty dollars and sixty-four cents ($920.64), a more particular description of which said check is to the grand jurors aforesaid unknown; that the said check was then and there cashed and paid, and caused to be cashed and paid, out of the moneys, funds, and credits of the said national

banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Wm. S. Craft, treasurer of Fayette County, was not then and there entitled to withdraw from the said national banking association the said sum of nine hundred twenty dollars and sixty-four cents ($920.64) or any part thereof, because the said Wm. S. Craft, treasurer of Fayette County, then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid, and which said sum so withdrawn, paid, and caused to be paid as aforesaid was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of the said national banking association, as he, the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Wm. S. Craft, treasurer of Fayette County, then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Wm. S. Craft, treasurer of Fayette County, from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of said sum of nine hundred twenty dollars and sixty-four cents ($920.64)
89 to the said national banking association was not then and there in any way or manner secured, all of which he the said Josiah V. Thompson then and there well knew; that the said sum of nine hundred twenty dollars and sixty-four cents ($920.64) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, feloniously appropriated and converted to the use, benefit, and advantage of the said Josiah V. Thompson and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers persons to the grand jurors unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

90 TENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-first day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of

Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said twenty-first day of December, A. D. 1914, at the city of Uniontown, in the county of Fayette and the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud the said national banking association and divers other persons
91 to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, and its board of directors, and for the use, benefit, and advantage of the said Josiah V. Thompson and for the use, benefit, and advantage of one, Wm. S. Craft, treasurer of Fayette County, and for the use, benefit, and advantage of divers other persons to the grand jurors unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of twelve hundred ten dollars and ninety-five cents ($1,210.95), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following; that is to say, on the said twenty-first day of December, A. D. 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud the said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain moneys, funds, and credits of the said national banking association and converted the same to the use, benefit, and advantage of him the said Josiah V. Thompson, and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers other persons to the grand jurors aforesaid unknown, to wit, the sum of twelve hundred ten dollars and ninety-five cents ($1,210.95) then and there belonging to and being the property of the said national banking association, by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn upon and addressed to the said
92 national banking association by the said Wm. S. Craft, treasurer of Fayette County, dated December 21st, A. D. 1914, and

payable to the order of one, E. S. Hackney, cashier, in the sum of twelve hundred ten dollars and ninety-five cents ($1,210.95) a more particular description of which said check is to the grand jurors aforesaid unknown; that the said check was then and there cashed and paid, and caused to be cashed and paid, out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Wm. S. Craft, treasurer of Fayette County, was not then and there entitled to withdraw from the said national banking association the said sum of twelve hundred ten dollars and ninety-five cents ($1,210.95) or any part thereof, because the said Wm. S. Craft, treasurer of Fayette County, then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid, and which said sum so withdrawn, paid and caused to be paid as aforesaid was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of the said national banking association, as he, the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Wm. S. Craft, treasurer of Fayette County, then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Wm. S. Craft, treasurer of Fayette County, from the said national banking association any amount of moneys,
funds, and credits whatever; that the repayment of said sum
93 of twelve hundred ten dollars and ninety-five cents ($1,210.95)
to the said national banking association was not then and there in any way or manner secured, all of which he the said Josiah V. Thompson then and there well knew; and the said sum of twelve hundred ten dollars and ninety-five cents ($1,210.95) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said Josiah V. Thompson and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers persons to the grand jurors unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

94 ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the thirtieth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county

of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had then theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds and credits of the said national banking association on the said thirtieth day of December, A. D. 1914, at the city of Uniontown, in the County of Fayette and the State and district aforesaid, did, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand
95 jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, and its board of directors, and for the use, benefit, and advantage of the said Josiah V. Thompson and for the use, benefit, and advantage of one, Wm. S. Craft, treasurer of Fayette County, and for the use, benefit, and advantage of divers other persons to the grand jurors unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of thirteen hundred eighty dollars and fifty cents ($1,380.50) a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following—that is to say, on the said thirtieth day of December, A. D. 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain moneys, funds, and credits of the said national banking association and converted the same to the use, benefit, and advantage of him the said Josiah V. Thompson, and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers other persons to the grand jurors aforesaid unknown, to wit, the sum of thirteen hundred eighty dollars and fifty cents, then and there belonging to and being the property of the said national banking association, by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national bank-

ing association, upon a certain check then and there drawn upon and addressed to the said national banking association by the said
96 Wm. S. Craft, treasurer of Fayette County, dated December, A. D. 1914, and payable to the order of one, E. S. Hackney, cashier, in the sum of thirteen hundred eighty dollars and fifty cents ($1,380.50), a more particular description of which said check is to the grand jurors aforesaid unknown; that the said check was then and there cashed and paid, and caused to be cashed and paid, out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Wm. S. Craft, treasurer of Fayette County, was not then and there entitled to withdraw from the said national banking association the said sum of thirteen hundred eighty dollars and fifty cents ($1,380.50), or any part thereof, because the said Wm. S. Craft, treasurer of Fayette County, then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid, and which said sum so withdrawn, paid, and caused to be paid as aforesaid was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of the said national banking association, as he, the said Josiah V. Thompson, then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Wm. S. Craft, treasurer of Fayette County, then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Wm. S. Craft, treasurer of Fayette County, from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of said sum of thirteen
97 hundred eighty dollars and fifty cents ($1,380.50) to the said national banking association was not then and there in any way or manner secured, all of which he the said Josiah V. Thompson then and there well knew; and the said sum of thirteen hundred eighty dollars and fifty cents ($1,380.50) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, feloniously appropriated and converted to the use, benefit, and advantage of the said Josiah V. Thompson and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers persons to the grand jurors unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

98 TWELFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifteenth day of January, in the year of our Lord one thousand nine hundred and fifteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had then theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said fifteenth day of January, A. D. 1915, at the city of Uniontown, in the county of Fayette and the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with the intent to injure and defraud the said national banking association and divers other persons to the
99 grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association and its board of directors and for the use, benefit, and advantage of the said Josiah V. Thompson, and for the use, benefit, and advantage of one, Wm. S. Craft, treasurer of Fayette County, and for the use, benefit, and advantage of divers other persons to the grand jurors unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of six hundred seventy-six dollars ($676.00), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following; that is to say, on the said fifteenth day of January, A. D. 1915, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain moneys, funds, and credits of the said national banking association and converted the same to the use, benefit, and advantage of him the said Josiah V. Thompson, and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers other persons to the grand jurors aforesaid unknown, to wit, the sum of six hundred seventy-six dollars ($676.00), then and there belonging to and being the property of the said national banking association, by then and

there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn upon and addressed to the said national banking association by the said Wm. S. Craft, treasurer of Fayette County, dated January , A. D. 1915, and payable
100 to the order of one, E. S. Hackney, cashier, in the sum of six hundred seventy-six dollars ($676), a more particular description of which said check is to the grand jurors aforesaid unknown; that the said check was then and there cashed and paid, and caused to be cashed and paid, out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Wm. S. Craft, treasurer of Fayette County, was not then and there entitled to withdraw from the said national banking association the said sum of six hundred seventy-six dollars ($676.00), or any part thereof, because the said Wm. S. Craft, treasurer of Fayette County, then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid, and which said sum so withdrawn, paid, and caused to be paid as aforesaid was then and there in excess of all amounts which the said Wm. S. Craft, treasurer of Fayette County, was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of the said national banking association, as he, the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Wm. S. Craft, treasurer of Fayette County, then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Wm. S. Craft, treasurer of Fayette County, from the said national banking association any amount of moneys, funds, and credits whatever; that he repayment of said sum of six hundred seventy-six dollars ($676.00) to the said national banking association was not then and there in any way or manner
101 secured, all of which he the said Josiah V. Thompson then and there well knew; and the said sum of six hundred seventy-six dollars ($676.00) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said Josiah V. Thompson and to the use, benefit, and advantage of the said Wm. S. Craft, treasurer of Fayette County, and divers persons to the grand jurors unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

102 THIRTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the fifth day of October, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as the First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson, so being then and there President of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association, on the said fifth day of October, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent

103 of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of him, the said Joseph V. Thompson, and for the use, benefit, and advantage of one F. G. Springer and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of twenty-five hundred eighty-one dollars and three cents ($2,581.03) and of the value of twenty-five hundred eighty-one dollars and three cents ($2,581.03), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following—that is to say, that on the said fifth day of October, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's, use, and to the use of divers other persons to the grand jurors un-

known, to wit, the sum of twenty-five hundred eighty-one dollars and three cents ($2,581.03) then and there belonging to and being the property of the said national banking association by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn and caused to be drawn upon and addressed to the said national banking association by the said Josiah V. Thompson, which said check was dated the fifth day of October, 1914,
and purported to authorize and direct the said national bank-
104 ing association to pay to the bearer, F. G. Springer, Coll., the
sum of twenty-five hundred eighty-one dollars and three cents ($2,581.03); that the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Joseph V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of twenty-five hundred eighty-one dollars and three cents ($2,581.03) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association as he, the said Josiah V. Thompson, then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of twenty-five hundred eighty-one dollars and three cents ($2,581.03) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson, then and there well knew; that the said sum of twenty-five hundred and eighty-one dollars and three cents ($2,581.03) of the moneys, funds,
and credits of the said national banking association was then
105 and there wilfully, knowingly, wrongfully, unlawfully, and
feloniously appropriated and converted to the use, benefit, and advantage of the said F. G. Springer and divers other persons to the grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

106 FOURTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association on the said twenty-sixth day of October, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent of the said national banking associa-
107 tion, its board of directors and committees, and for the use, benefits, and advantage of him, the said Josiah V. Thompson, and for the use, benefit, and advantage of one S. J. Feather and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of eleven hundred two dollars and twenty-six cents ($1,102.26) and of the value of eleven hundred two dollars and twenty-six cents ($1,102.26), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid, unknown, in the manner and by the means following, that is to say, that on the said 26th day of October, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's own use, and to the use of divers other persons to the grand jurors unknown, to wit, the sum

of eleven hundred two dollars and twenty-six cents ($1,102.26) then and there belonging to and being the property of the said national banking association by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn and caused to be drawn upon and addressed to the said national banking association by the said Josiah V. Thompson which said check was dated the 26th day of October, 1914, and purported to authorize and direct the said national banking association to pay to
the order of one S. J. Feather, or bearer, the sum of eleven
108 hundred two dollars and twenty-six cents ($1,102.26); that
the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of eleven hundred two dollars and twenty-six cents ($1,102.26) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid, and which said sum so withdrawn, paid, and caused to be paid as aforesaid was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association, as he the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of eleven hundred two dollars and twenty-six cents ($1,102.26) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson then and there well knew; that the said sum of eleven hundred two dollars and twenty-six cents ($1,102.26) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted
to the use, benefit, and advantage of the said S. J. Feather
109 and divers other persons to the grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

110 FIFTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the twenty-third day of November, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association, on the said twenty-third day of November, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did willfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent of the said
111 national banking association, its board of directors, and committees, and for the use, benefit, and advantage of him, the said Josiah V. Thompson, and for the use, benefit, and advantage of John Galica and Francesco Galica and divers other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of one thousand dollars ($1,000.00) and of the value of one thousand dollars ($1,000.00), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following, that is to say, that on the said twenty-third day of November, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did willfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply, certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's own use, and to the use of divers

other persons to the grand jurors unknown, to wit, the sum of one thousand dollars ($1,000.00) then and there belonging to and being the property of the said national banking association by them and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn and caused to be drawn upon and addressed to the said national banking association by the said Josiah V. Thompson, which said check was dated the twenty-third day of November, 1914, and purported to authorize and direct the said national banking association to pay to John Galica and Francesco Galica, or bearer, the sum of one thousand dollars
112 ($1,000.00); that the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of one thousand dollars ($1,000.00) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association as he the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of one thousand dollars ($1,000.00) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson then and there well knew; that the said sum of one thousand dollars ($1,000.00) of the moneys, funds, and credits of the said national banking association was then and there willfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said John Galica and Francesco Galica and
113 divers other persons to the grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

114 SIXTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the first day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association, on the said first day of December, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent of the said
115 national banking association, its board of directors and committees, and for the use, benefit, and advantage of him, the said Josiah V. Thompson and for the use, benefit, and advantage of one Jasper Augustine and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of five thousand dollars ($5,000.00) and of the value of five thousand dollars ($5,000.00), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following—that is to say, that on the said first day of December, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's use, and to the use of divers other persons to the grand jurors unknown, to wit, the sum of five thousand dollars ($5,000.00)

then and there belonging to and being the property of the said national banking association by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn and caused to be drawn upon and addressed to the said national banking association by the said Josiah V. Thompson which said check was dated the first day of December, 1914, and purported to authorize and direct the said national banking association to
116 pay to Jasper Augustine, or order, the sum of five thousand dollars ($5,000.00); that the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of five thousand dollars ($5,000.00) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association as he, the said Josiah V. Thompson, then and there well knew; that on the day last aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of five thousand dollars ($5,000.00) to the said national banking association was not then and there in any way of manner secured, all of which he, the said Josiah V. Thompson, then and there well knew; that the said sum of five thousand dollars ($5,000.00) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said Jasper Augustine
117 and divers other persons to the grand jurors aforesaid unknown by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

118 SEVENTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county

of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association on the said fifth day of December, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette, and in the State and district afoesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent
119 of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of him, the said Josiah V. Thompson, and for the use, benefit, and advantage of one F. M. Semans, jr., and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of twenty-two hundred fifty dollars $2250.00) and of the value of twenty-two hundred fifty dollars ($2250.00), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following, that is to say, that on the said fifth day of December, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's, use and to the use of divers other persons to the grand jurors unknown, to wit, the sum of twenty-two hundred fifty dollars ($2250.00) then and there belonging to and being the property of the said national banking association by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association, upon a certain check then and there drawn and cause to be drawn upon and addressed to the said national

banking association by the said Josiah V. Thompson which said check was dated the fifth day of December, 1914, and pur-
120 ported to authorize and direct the said national banking association to pay to interest (F. M. Semans, jr.) or bearer, the sum of twenty-two hundred fifty dollars ($2250.00); that the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of twenty-two hundred fifty dollars ($2250.00) or any part thereof, because thes aid Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid, and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association, as he, the said Josiah V. Thompson, then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid, as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of twenty-two hundred fifty dollars ($2250.00) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson
121 then and there well knew; that the said sum of twenty-two hundred fifty dollars ($2250.00) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said F. M. Semans, jr., and divers other persons to the grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

122 EIGHTEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking

association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as President of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association, on the said twenty-fourth day of December, A. D. 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent of the said national banking associa-
123 tion, its board of directors and committees, and for the use, benefit, and advantage of him, the said Josiah V. Thompson and for the use, benefit and advantage of one John S. Douglas and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds and credits of the said national banking association, to wit, the sum of eleven hundred forty-two dollars ($1,142.00) and of the value of eleven hundred forty-two dollars ($1,142.00) a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following, that is to say, that on the said twenty-fourth day of December, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's use, and to the use, of divers other persons to the grand jurors unknown, to wit, the sum of eleven hundred forty-two dollars ($1,142.00) then and there belonging to and being the property of the said national banking association, upon a certain check then and there drawn and caused to be drawn upon and addressed to the said national banking association by the said Josiah V. Thompson which said check was dated the 24th day of December, 1914, and purported to authorize and direct the said national banking association to pay to John S. Douglas, or order, the sum of eleven hundred forty-two dollars ($1,142.00); that the said check was then

and there cashed and paid and caused to be cashed and paid out of the moneys, funds, and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president
124 as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of eleven hundred forty-two dollars ($1,142.00) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association as he, the said Josiah V. Thompson then and there well knew; that on the day last aforesaid when the said check was paid and caused to be paid as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of eleven hundred forty-two dollars ($1,142.00) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson, then and there well knew; that the said sum of eleven hundred forty-two dollars ($1,142.00) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said John S. Douglas and divers other persons to the grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson, as aforesaid, whereby the said sum became, then and there, lost to the said
125 national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

126 NINETEENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-fourth day of December, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, and in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established

and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania and district aforesaid, under the laws of the United States; that he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson, as said president of said national banking association, possessed over the moneys, funds, and credits of the said national banking association, on the said twenty-fourth day of December, 1914, then and there, at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowongly, wrongfully, unlawfully, feloniously and with intent to injure and defraud said national banking association and divers other persons to the grand jurors unknown, and without the knowledge and consent of
127 the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of him, the said Josiah V. Thompson and for the use, benefit, and advantage of one State Bank, Dravosburg, Pa., and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of two thousand dollars ($2,000.00) and of the value of two thousand dollars ($2,000.00), a more particular description of which said moneys, funds, and credits is to the grand jurors aforesaid unknown, in the manner and by the means following—that is to say, that on the said twenty-fourth day of December, 1914, the said Josiah V. Thompson, president as aforesaid of the said national banking association, did wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, then and there misapply certain of the moneys, funds, and credits of the said national banking association and convert the same to his, the said Josiah V. Thompson's use, and to the use, of divers other persons to the grand jurors unknown, to wit, the sum of two thousand dollars ($2,000.00) then and there belonging to and being the property of the said national banking association by then and there paying and causing the said sum to be paid out of the moneys, funds, and credits of the said national banking association by the said Josiah V. Thompson which said check was dated the twenty-fourth day of December, 1914, and purported to authorize and direct the said national banking association to pay to State Bank, Dravosburg, Pa., or order, the sum of two thousand dollars ($2,000.00);
128 that the said check was then and there cashed and paid and caused to be cashed and paid out of the moneys, funds and credits of the said national banking association as aforesaid by the said Josiah V. Thompson, president as aforesaid, and that the said Josiah V. Thompson was not then and there entitled to withdraw from the said national banking association the said sum of two

thousand ($2,000.00) or any part thereof, because the said Josiah V. Thompson then and there had no deposit in and with the said national banking association from and out of which the said check could be lawfully paid and which said sum so withdrawn, paid and caused to be paid as aforesaid, was then and there in excess of all amounts which the said Josiah V. Thompson was then and there entitled to withdraw from and have paid out of the moneys, funds, and credits of said national banking association as he, the said Josiah V. Thompson then and there well knew; that on the day last aforesaid, when the said check was paid and caused to be paid as aforesaid, the said Josiah V. Thompson then and there had no moneys, funds, and credits on deposit in and with the said national banking association; that there was not then and there due and owing to the said Josiah V. Thompson from the said national banking association any amount of moneys, funds, and credits whatever; that the repayment of the said sum of two thousand dollars ($2,000.00) to the said national banking association was not then and there in any way or manner secured, all of which he, the said Josiah V. Thompson then and there well knew; that the said sum of two thousand dollars ($2,000.00) of the moneys, funds, and credits of the said national banking association was then and there wilfully, knowingly, wrongfully, unlawfully, and feloniously appropriated and converted to the use, benefit, and advantage of the said State Bank, Dravosburg, Pa., and divers other persons to the
129 grand jurors aforesaid unknown, by the said acts and doings of the said Josiah V. Thompson as aforesaid, whereby the said sum became then and there lost to the said national banking association; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

130 TWENTIETH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the sixth day of July, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president and agent of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then and there existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president and agent of the said national banking association as

aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president and agent of the said national banking association and by virtue of the power of control, direction, and management which the said Josiah V. Thompson as such president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said sixth day of July, A. D. 1914, at the city of Uniontown, in the county of Fayette and the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association and its
131 board of directors, and for the use, benefit, and advantage of the said Josiah V. Thompson, and for the use, benefit, and advantage of divers other persons to the grand jurors unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31), in the manner and by the means following: That is to say, that on the third day of July, A. D. 1914, the said First National Bank of Uniontown received and accepted from one William S. Craft, who was then and there treasurer of the county of Fayette of the State of Pennsylvania, one certain check, which said check was signed by T. D. Moore, collector of taxes, drawn upon the National Deposit Bank of Brownsville, Pennsylvania, payable to the order of W. S. Craft, treas., in the sum of thirty-seven thousand four hundred and fifty dollars and thirty-one cents ($37,450.31), and one other certain check, which said check was signed by J. E. Kelly, collector of taxes, drawn upon the Masontown National Bank of Masontown, Pennsylvania, payable to the order of W. S. Craft, treas., in the sum of thirty-nine thousand three hundred dollars ($39,300.00), a more particular description of which said checks is to the grand jurors unknown; that the said two checks were delivered to the said First National Bank of Uniontown by the said William S. Craft for deposit in and credit to the account of said William S. Craft, treasurer of Fayette County, Pennsylvania, in and with the said First National Bank of Uniontown; that the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31), it being the proceeds of the said checks so received for deposit from the said William S. Craft as aforesaid, was
132 in due course collected by the said First National Bank of Uniontown; that the said Josiah V. Thompson, president as aforesaid, on the sixth day of July, A. D. 1914, did then and there cause the proceeds of the said checks, so collected as aforesaid, to be credited to the individual account of him, the said Josiah V. Thompson, in and with the said First National Bank of Uniontown, upon the books of the said national banking association; that the said Josiah V. Thompson, president as aforesaid, did then and there

cause the proceeds of the said checks to be so entered to the credit of the individual account of him, the said Josiah V. Thompson, upon the books of the said First National Bank of Uniontown, without the authority of the said national banking association, and without the authority of the said William S. Craft; that the said Josiah V. Thompson, president as aforesaid, so having fraudulently obtained credit for the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31), it being the proceeds of the two checks so received for deposit from the said William S. Craft, and collected by the said First National Bank of Uniontown as aforesaid, he, the said Josiah V. Thompson, did thereupon withdraw from the said national banking association the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31), upon and by means of divers checks addressed to the said First National Bank of Uniontown by the said Josiah V. Thompson, a more particular description of the manner and means whereby the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31) of the moneys, funds, and credits of the said national banking association was withdrawn from the said First National Bank of Uniontown by the said Josiah V. Thompson, president as aforesaid, is to the grand jurors unknown; that the said Josiah V. Thompson, president
133 as aforesaid, did convert to his own use, benefit, and advantage, and to the use, benefit, and advantage of divers other persons to the grand jurors unknown, the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents, ($76,750.31) of the moneys, funds, and credits of the said national banking association, so withdrawn from the said First National Bank of Uniontown by the said Josiah V. Thompson as aforesaid; and so the grand jurors aforesaid do say, that the said Josiah V. Thompson, president as aforesaid, in manner and form, and by the means, and for the use and benefit, and with the intent, and without the knowledge and consent aforesaid, seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31) of the said moneys, funds, and credits of the said national banking association, wrongfully and unlawfully did then and there wilfully misapply; and by reason of the said acts and doings of the said Josiah V. Thompson as aforesaid, the said sum of seventy-six thousand seven hundred and fifty dollars and thirty-one cents ($76,750.31) of the moneys, funds, and credits of the said national banking association were lost to the said national banking association, and its assets depleted in such amount; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

134 TWENTY-FIRST COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the third day of July, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporation then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and the moneys, funds, and credits of the said national banking association on the said third day of July, A. D. 1914, then and there at the city of Uniontown, on the county of Fayette, and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of seventy-six thousand seven hundred fifty dollars and thirty-one cents ($76,750.31), a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and can not be herein set forth, all of which he, the said Josiah V. Thompson, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

135

136 TWENTY-SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of October, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was

then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and the moneys, funds, and credits of the said national banking association on the said fifth day of October, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the
137 said national banking association and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of twenty-five hundred eighty-one dollars and three cents ($2581.03), a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he, the said Josiah V. Thompson, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

138 TWENTY-THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-sixth day of October, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and the moneys, funds, and credits of the said national banking associa-

tion on the said twenty-sixth day of October, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud
139 the said national banking association and without the knowledge and consent thereof, abstract, and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association the amount and value of eleven hundred two dollars and twenty-six cents ($1,102.26) a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

140 TWENTY-FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-third day of November, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and the moneys, funds, and credits of the said national banking association on the said twenty-third day of November, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette, and in the State and district aforesaid, did wilfully, knowingly, wrong-
141 fully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, and without the knowledge and consent threof, abstract and convert to his, the said Josiah V. Thompson's, own use certain of the moneys, funds, and credits of the said national banking association of the amount and value of one thousand dollars ($1,000.00), a more particular de-

scription of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he, the said Josiah V. Thompson, then and there well knew, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

142 TWENTY-FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the first day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, was the president of a certain national banking association a body corporation then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organised and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said first day of December, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association and without the knowledge
143 and consent thereof, abstract, and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of five thousand dollars ($5,000) a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

144 TWENTY-SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the fifth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county

of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said fifth day of December, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlaw-
145 fully, feloniously, and with intent to injure and defraud the said national banking association and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's, own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of twenty-two hundred and fifty dollars ($2,250), a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

146 TWENTY-SEVENTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, was the president of a certain national banking association a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson so being then and there president of the said national banking association as aforesaid, and

by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds and credits of the said national banking association on the said twenty-fourth day of December, A. D., 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking associa-
147 tion and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds and credits of the said national banking association of the amount and value of eleven hundred forty-two dollars ($1142.00), a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he the said Josiah V. Thompson then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

148 TWENTY-EIGHTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said twenty-fourth day of December, A. D. 1914, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud

149 the said national banking association and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of two thousand dollars ($2,000), a more particular description of which said moneys, funds, and credits is to the grand jurors unknown and cannot be herein set forth, all of which he, the said Josiah V. Thompson, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

150 TWENTY-NINTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the thirteenth day of January, in the year of our Lord one thousand nine hundred and fifteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one, Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of Uniontown, in the county of Fayette, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association as aforesaid, and by virtue of the official relation of the said Josiah V. Thompson as president of the said national banking association and by virtue of the power, control, direction, and management which the said Josiah V. Thompson as said president of said national banking association possessed over the affairs of said national banking association and over the moneys, funds, and credits of the said national banking association on the said thirteenth day of January, A. D. 1915, then and there at the city of Uniontown, in the county of Fayette and in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud

151 the said national banking association and without the knowledge and consent thereof, abstract and convert to his, the said Josiah V. Thompson's own use, certain of the moneys, funds, and credits of the said national banking association of the amount and value of ninety-eight thousand seven hundred thirty-three dollars and ninety-four cents ($98,733.94), a more particular description of which said moneys, funds, and credits and a more particular description of the manner of said abstraction are to the grand jurors unknown and cannot be herein set forth, all of which he, the said Josiah V. Thompson, then and there well knew; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

152 THIRTIETH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present:

That on the nineteenth day of December, in the year of our Lord, one thousand nine hundred and fourteen, at Uniontown, in the county of Fayette, in the Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, was the president of a certain national banking association, a body corporate then and there known and designated as The First National Bank of Uniontown, in the city of Uniontown, in the county of Fayette and State of Pennsylvania, which said national banking association had been theretofore created, organized, and established and was then existing and doing business in the city of Uniontown, in the county of Fayette, in the State of Pennsylvania, under the laws of the United States;

That he, the said Josiah V. Thompson, so being then and there president of the said national banking association, as aforesaid, did, on the said nineteenth day of December, A. D. 1914, at the said city of Uniontown, and the county and State and district aforesaid, by virtue of his said office and employment and while he was so being employed and acting as such president of the said national banking association, as aforesaid, have, receive, and take into his possession and under his control, certain moneys, funds, and credits of the said national banking association of the amount and value of ten thousand dollars ($10,000.00) to wit, ten thousand dollars ($10,000.00) of circulating notes, commonly called national bank notes, intended to pass and circulate as money, a more particular description of which said notes aforesaid, is to the grand jurors aforesaid, unknown; the
153 said sum of ten thousand dollars ($10,000.00) being then and there the property of the said national banking association, and which said sum of ten thousand dollars ($10,000.00), he, the said Josiah V. Thompson, held for and in the name and on account of the said national banking association and so being then and there president of the said national banking association, and so having in his possession and under his control, the said moneys, funds, and credits last aforesaid, did, then and there feloniously, wilfully, knowingly, wrongfully, unlawfully, and with intent to injure and defraud the said national banking association, embezzle the said moneys, funds, and credits and convert the same to his own use; contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

E. LOWREY HUMES,
United States Attorney.

3/28/16.

Certified from the record this 28th day of March, A. D. 1916, as a true copy.

[SEAL.]

J. WOOD CLARK,
Clerk, U. S. Dist. Court, West. Dist. of Pa.

Form No. 168.

Back or cover of indictment with plea and judgment. Witnesses: John H. Strawn,√ Capt. W. S. Craft, A. P. Smith,√ Ewing Townsend,√ E. S Hackney,√ W. B. Beeson,√ John Galica,√ W. A. Stone,√ James C. Whaley,√ T. D Bliss,√ Thomas D. Bailes,√ Susan Sellers,√ F. M. Seamans, jr.√

Above witnesses whose names are checked, sworn by me, this 22, 23 & 24 days of March, 1916.

GEORGE L. DAWSON,
Foreman.

No. 17. March term, 1916. Criminal docket. United States District Court, Western District of Pennsylvania. The United States vs. Josiah V. Thompson Indictment for violation of banking laws; 1-20: Wilful misapplication; 21-29: Abstraction; 30: Embezzlement. A true bill. George L. Dawson, foreman grand jury. Filed March 24th, 1916. J. Wood Clark, clerk. E. Lowry Humes, U. S. attorney. Neil W. McGill, Ass't U. S. attorney.

155 In the District Court of the United States for the Western District of Pennsylvania. No. 17 of March term, A. D. 1916.

THE UNITED STATES
vs.
JOSIAH V. THOMPSON. } Indictment for violation of banking laws.

Motion to quash indictment.

Filed May 7" 1918, J. Wood Clark, clerk.

And now, May 7, 1918, Josiah V. Thompson, defendant in the above entitled caused, comes into court, and, by his counsel, respectfully moves the court to quash the indictment in this cause for the reasons following:

1. That said indictment was not based upon any preliminary accusation or complaint, verified under oath, upon which accusation the defendant had a hearing before a committing magistrate—whereby defendant was deprived of his constitutional right to demand and be informed of the nature and cause of the accusation against him, and to meet and be confronted with the witnesses against him.

2. That said indictment was returned "a true bill" and filed in this court March 24th, 1916, upon and pursuant to a presentment made to said court, on the same day, by the United States grand jury for said district while said court was sitting at the city of Erie, in said district—which said presentment was not made from the personal knowledge of any of the grand jurors, nor from the testimony of witnesses sent before the said grand jury by leave of, or by order of the court.

3. The indictment is not supported or warranted by the presentment of the grand jury upon which it is based.

156 4. The knowledge upon which said presentment was so made, came to said grand jury "through the evidence of certain witnesses" called before said grand jury by the United States attorney without the order or permission of the court and the subject matter of said presentment was not called to the attention of, or given in charge or submitted to, the grand jury by the court.

5. That theretofore, to wit, on or about the first, second, and third days of Feb., A. D. 1916, after first having their attention called to the matter by the court, a prior United States grand jury then sitting for said district, at the city of Pittsburgh, in said district, heard certain witnesses, called before said grand jury by the United States attorney, with the permission of or by order of said court, of and concerning the same subject matter comprised and embraced in said presentment, afterwards, and as aforesaid, returned into said court at said city of Erie, and likewise contained and embraced in the several counts in said indictment, afterwards, and as aforesaid, returned "a true bill" at said city of Erie on March 24th, A. D. 1916.

That said grand jury, so sitting at said city of Pittsburgh, and so having heard said witnesses, did, on Feb. 4, 1916, make a presentment to said court at Pittsburgh, covering a part of the same subject matter as is contained in said later presentment, so as aforesaid, and afterwards, made to said court at the city of Erie, to wit, the charge of "willful misapplication, etc.," but refused to include in said Pittsburgh presentment that said defendant had "willfully embezzeled and abstracted certain of the moneys, funds, and credits of the said First National Bank of Uniontown, Pennsylvania." That pursuant to said presentment so made at Pittsburgh, the United States attorney did, by order of court, on Feb. 4, 1916, lay before said grand jury at Pittsburgh an indictment against said defendant containing forty-seven counts or charges, alleging violations of the national banking laws, thirty of which counts were rejected by said grand jury, and upon which they refused to find a true bill; that said thirty counts, so rejected, charged said offenses of "willful misapplication, etc.," "embezzlement" and "abstraction, etc."

That thereafter, to wit, Feb. 7th, 1916, said United States attorney withdrew said bill from before said grand jury at Pittsburgh, and, on the same day, laid another bill against said defendant before said grand jury, containing seventeen counts, none of which counts charged either of the offenses of "willful misapplication, etc.'" "embezzlement" or "abstraction, etc.," and which bill was on the same day, returned into said court at Pittsburgh "a true bill."

That said thirty counts against said defendant, contained in said indictment, so as aforesaid rejected by said grand jury sitting at the city of Pittsburgh, on Feb. 7, 1916, are identical with the matter contained and embraced in the thirty counts comprising and making up the indictment against said defendant, so as aforesaid, returned "a

true bill" against him, on March 24, 1916, by the later grand
157 jury, so as aforesaid, sitting at the city of Erie, and that most of the witnesses, if not all of them, so as aforesaid called and examined, by the said grand jury at the city of Erie, were called and examined, as aforesaid, before said prior grand jury at the city of Pittsburgh.

6. After this indictment was prepared and presented to the grand jury, pursuant to the order of court of March 24th, 1916, no witnesses were called or sworn or examined before said grand jury touching or concerning the charges therein contained.

Wherefore, defendant tendering herewith the affidavits of Robert I. Patterson and George L. Dawson, members of said Pittsburg and Erie grand juries, respectively, in support of the facts hereinbefore averred, which do not appear of record, and offering to prove said facts by depositions or in any manner that the court may direct, prays judgment on said indictment and that the same may be quashed.

W. C. McKean,
J. E. B. Cunningham,
R. M. Gibson,
Attys. for Defendant.

158 U. S. vs. THOMPSON.

Filed May 8, 1918, J. Wood Clark, clerk.

Transcript of proceedings sur motion to quash.

And now Wednesday, May 8, 1918, trial resumed at ten o'clock a. m.

On the motions to quash the indictments, the following ruling was made:

By the Court: In the brief time given to the court for the consideration of these motions, elaboration of opinion can not be made.

I am satisfied that, with respect to the indictment at No. 21 November term, 1915, called the "Pittsburgh indictment," no substantial rights of the defendant have been invaded. And therefore the motion to quash the indictment at No. 21 November term, 1915, is overruled and an exception as to such ruling is noted to the defendant.

With respect, however, to the motion to quash the indictment designated in the argument as the "Erie indictment," at No. 17 March term, 1916, this court has reached a different conclusion.

It appears that the matters embraced within that indictment were
159 the identical matters submitted to the grand jury which found the former bill at Pittsburgh, in addition to the matters specially charged in that bill.

It appears further that those matters were not included in the indictment at the Pittsburgh term, and were not deemed by that grand jury to be charges for which the defendant should be brought to trial.

The resubmission of those matters to the later grand jury at the Erie term was without the knowledge or approval of the court. The resubmission of the offenses against the Government to a new grand jury is a matter of highest prerogative, and is always subject to the control of the court, and, in proper cases, always granted by the court.

In this case, it does not now appear that there was an absence of evidence when those matters were first submitted at Pittsburgh; it does not appear of record that any application to the court was made for a resubmission of those matters to the Erie grand jury.

Again, it appears from briefs of counsel acting on behalf of the Government in this case, and from statements made by
160 them, that there was a special designation by the Attorney General, or some one, to attend the sessions of the grand jury at Erie and proceed with the investigation.

We have, then, a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant, who was not indicted by the first grand jury, which, according to its presentment, had not sufficient evidence before it, to justify the indictment, and which, according to the facts as found, contained the same matters as the later grand jury found in its indictment.

I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities and, therefore, I must sustain the motion to quash the indictment found at Erie, and note an exception to the Government.

The court further wishes to state that the control of the
161 grand jury by common law and by statute law is under the court and the proceedings are under the control of the court.

Mr. RUSH. May it please the court, the holding, then, of the court, as I understand it, is that the presentation of the case to the grand jury, which has been formerly ignored, would be a bar to a subsequent presentation, unless leave of court were granted.

BY THE COURT. Without the permission of the court, yes. I think that is the law, and that is what I have stated.

Mr. RUSH. As I take it, it was stated here, upon argument, that this subsequent presentation was by a special assistant to the Attorney General of the United States.

BY THE COURT. That may be. That is not perhaps the ground of my ruling, because that is not made the subject of exception by defendant, but I call attention to the fact that now appears in this record for the first time.

Mr. RUSH. Do I understand counsel for the defendant that
162 they want to make that an exception here in this record?

Mr. GIBSON. May it please the court, in view of the fact that the knowledge as to the proceeding in regard to an unauthorized officer having appeared before the grand jury at Erie, developed

during the argument of the previous motion, we ask leave to include, as a part of our motion to quash, a reason setting forth that one W. Risley Brown appeared before the grand jury and presented the case of the Government to the grand jury, examining the witnesses, without due authority or authorization.

Mr. Rush. As to that, I ask leave to offer that authority, over the signature of the Attorney General.

By the Court. In view of the fact that there is no record of the designation of this special assistant, I will permit counsel for the defendant to include that within their reasons in support of the motion to quash. If it had been of record, I would not permit it at this late date.

Mr. Rush. Does the court permit me to offer that authority?

163 By the Court. Yes, you may offer it and have it filed.

District Attorney Humes here stated that he had at Erie moved the admission of Mr. Brown and the attention of the court was at that time called to the fact that he was designated as a special assistant for the purpose of appearing before the grand jury in the presentation of this case, with the request that it be noted on the minutes; which notation apparently was not made.

By the Court. It now appears that the authorization by the Attorney General to Mr. Brown was filed in this court on March 20, 1916, the record having been produced by the United States attorney. This, however, does not alter the ruling of the court in the matter, but modifies the expression he has previously used with respect to this authorization not appearing upon the record.

164 Mr. McKean. May it please the court, in order that the record may be in proper shape, we desire to make another motion on behalf of the defendant, as follows:

And now, May 8th, 1918, Josiah V. Thompson, defendant in the above entitled cause, comes into court, and, by his counsel, respectfully moves the court to quash the counts in the above indictment charging "unlawfully certifying checks, etc.," said counts being 1 to 8, inclusive, therein, for the following reasons:

The said eight counts in said indictment are not authorized or supported by the presentment of the grand jury upon which said indictment is based, in that,

(a) Said grand jury does not therein charge said defendant with the offense of "unlawfully certifying checks, etc."

(b) Said grand jury does not therein request or recommend that an indictment be laid before it charging said defendant with said offense.

(c) The order of court, made upon said presentation does not authorize the district attorney to charge defendant with said
165 offense or to lay an indictment before said grand jury charging him therewith.

Motion overruled and exception noted to defendant.

Counsel for the Government, in view of the decision of the court with respect to the motion to quash the "Erie indictment," ask that

further proceedings in the case be postponed until 1.30 o'clock p. m., in order that counsel may determine whether or not they shall proceed with the trial under the other indictment.

Whereupon, further proceedings were postponed until 1.30 o'clock p. m.

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166 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES,
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Motion for rehearing and to vacate the judgment of the court quashing the indictment.

Filed May 17", 1918, J. Ward Clark, clerk.

And now, to wit, May 13, 1918, comes the United States by its attorneys, E. Lowry Humes, United States district attorney for the Western District of Pennsylvania, John M. Henry, assistant United States attorney, and Sylvester R. Rush, special assistant to the Attorney General, and moves the court for rehearing on the motion to quash in the above-entitled case, and further moves the court to vacate and set aside its judgment quashing the said indictment, and to require said defendant to plead thereto, and, in support of said motion, assigns the following reasons:

1. That the several offenses charged in the indictment were all committed more than three years prior to May 7, 1918, the date of the filing of said motion to quash, and are now barred by the statute of limitations.

2. That it further appears that the First National Bank of Uniontown, Pennsylvania, of which the defendant was president, was closed and went into liquidation on the 18th day of January,
167 1915, and that all of the acts and crimes of which the defendant stands charged in said indictment were committed prior thereto.

3. That the court's order and decision that the submission of said cause to the grand jury sitting at the March term, A. D. 1916, was barred unless permission was given by the court to present said cause, constitutes and is an absolute bar to the presentation of this cause, for the reason that no lawful permission, in view of the running of the statute of limitations, could now be given to present this cause to any grand jury.

4. That the motion to quash pleaded in bar of this indictment contained special matter not disclosed by the record and the said motion to quash in that behalf was filed at a date long after, and too late to be legally sustained by this court.

5. That the special matter pleaded in said motion to quash and as a bar to said indictment does not set forth or allege want of oppor-

tunity of the defendant to make his objection earlier, nor assign any ground why exception was not taken or objection made before. And it further appears of record that the defendant at his own request, and over the objection of the United States, secured a postponement and continuance of the said cause from time to time.

6. That on April 28, 1916, the defendant entered into his recognizance for appearance at the September term, 1916, at Erie, Pennsylvania, in the above-entitled cause; that on December 30, 1916,
168 on petition of the defendant and over the objection of the United States attorney, said cause was ordered continued by his honor, Judge Charles P. Orr; that on April 14, 1917, on the petition of the defendant and over the objection of the United States attorney, said cause was again ordered continued by his honor, Judge Charles P. Orr; and that on October 16, 1917, on petition of the defendant, and over the objection of the United States attorney, said cause was again ordered continued by his honor, Judge Orr; and that the United States attorney at no time prior to the filing of the said motion to quash requested or caused said cause to be continued.

7. That it appeared to said grand jury sitting at the March term, A. D. 1916, from the testimony of the witnesses under oath and testifying before said grand jury, that there should be an indictment returned in said cause, a request was made by the grand jury through its foreman to the court permitting and directing the United States attorney to prepare and present an indictment in due form to the said grand jury. That his honor, Judge Charles P. Orr, sitting as said district court, thereupon, on March 24, 1916, signed a per curiam order directing the United States attorney to prepare and present to the grand jury such an indictment. The request of said foreman of the grand jury and the order of the said court are in words and figures following:

169 In the District Court of the United States for the Western District of Pennsylvania. Of March term, A. D. 1916.

The grand jury of the United States of America, now inquiring in and for the Western District of Pennsylvania, upon their oaths and solemn affirmations, respectively, do present:

That on the 15th day of October, 1914, and at divers times and dates prior thereto and thereafter, at Uniontown, in the county of Fayette, in the said Western District of Pennsylvania, and within the jurisdiction of this court, one Josiah V. Thompson, then president of the First National Bank of Uniontown, did wilfully misapply, embezzle, and abstract certain of the moneys, funds, and credits of the said First National Bank of Uniontown, Pennsylvania.

The aforesaid violations of law having come to the knowledge of the grand jury aforesaid through the evidence of certain witnesses sworn before us, the grand jury has made presentment as aforesaid of the same to the court, and further requests the court that the United States attorney be instructed to lay before this

grand jury a bill or bills of indictment more particularly and at length setting forth said violations of law.

(Signed) GEORGE L. DAWSON,
Foreman of the Grand Jury.

Order.

And now, to wit, March 24, 1916, the foregoing presented in open court, and ordered to be filed; and it is further ordered that the United States attorney prepare and present an indictment or indictments to the grand jury, as recommended.

PER CURIAM.

And that the said indictment so ordered and prepared by the United States district attorney was returned into open court by the said grand jury on the 24th day of March, 1916, and duly filed of record, and is the said indictment against which said motion to quash is filed, and against which the order and judgment of the said court is entered quashing the same.

170 8. That the matter specially pleaded in paragraph 1 of said motion to quash, and the order of the court quashing the indictment constitute and are an absolute bar to the return of any indictment in this case, because of the facts above stated, showing that the same is barred by the statute of limitations, and that all acts and crimes committed by the defendant as president of the said First National Bank of Uniontown were done and committed more than three years prior to the date of filing of said motion.

9. That whatever omission there may have been, if any there was, to secure the approval of the court to resubmit the charges against the defendant to the grand jury sitting at the March term, A. D. 1916, the same was fully cured by the per curiam order of the court wherein it was ordered that the United States attorney prepare and present an indictment or indictments to the grand jury for their return into court.

10. And the court further ruled and declared in rendering its judgment on said motion:

"That there was a special designation by the Attorney General, or some one, to attend the sessions of the grand jury at Erie and proceed with the investigation. We have, then, a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant, who was not indicted by the first grand jury, which, according to its presentment, had not sufficent evidence before it to justify the indictment, and which, according to the facts as found, contained the same matters as the later grand jury found in its indictment."

171 Whereas the said Special Assistant to the Attorney General was duly authorized and commissioned by the Attorney General under the following act of Congress to appear before said grand jury:

"The Attorney General or any officer of the Department of Justice, or any attorney or counsellor specifically appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought." U. S. Comp. Stat., 1916, vol. 1, p. 280, sec. 534, 34 Stat. L., 816.

And it was error for this court to hold that such could not be done without the approval or without permission of the court, and that the prior submission of said charges to a former grand jury constituted a bar to a resubmission without the permission of the court, when, in fact, no lawful permission could now be given in view of the absolute bar of the statute of limitations.

11. Wherefore, the court, in sustaining said motion to quash, wherein matter not appearing of record is set up as a ground for quashing said indictment, and by its said order quashing said indictment, further bars the return of any subsequent indictment in this case against the defendant as president of the First National Bank of Uniontown, on the criminal charges set forth in the said indictment or any other criminal charges that might arise in connection therewith.

Wherefore, the United States, through its attorneys, asks
172 that it may be granted a rehearing on said motion, and that said judgment and order quashing said indictment be vacated and set aside, and the said defendant be required to plead to the said indictment, and a rule issue upon defendant to show cause why the same should not be granted.

E. Lowry Humes,
United States Attorney.
John M. Henry,
Asst. U. S. Attorney.
Sylvester R. Rush,
Special Asst. to the Attorney General.

Order.

And now, to wit, May 17, 1918, the within motion is filed and rule to show cause granted, returnable May 27th, 1918, at 10 a. m.
Per Curiam.

173 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES OF AMERICA,
vs.
JOSIAH V. THOMPSON.
No. 17. March term, 1916.

Answer of defendant to rule to show cause why a rehearing should not be had of the motion to quash the indictment.

Filed May 25, 1918, J. Wood Clark, clerk.

And now, May —, 1918, comes Josiah V. Thompson, defendant above named, and for answer to the petition and rule granted May 17th, 1918, returnable May 27th, 1918, requiring defendant to show cause why a rehearing should not be had of the motion to quash the indictment at the above number and term, respectfully sets forth the following:

1st. In reply to the first paragraph of said petition, it is admitted that the said indictment, at the above number and term, charges the several offenses therein specified as having been committed more than three years prior to May 7th, 1918, the date of the filing of said motion to quash.

2nd. In reply to the second paragraph of said petition, it is admitted that the First National Bank of Uniontown, Pennsylvania, was closed and went into liquidation on the 18th day of January, 1915, and that said indictment charges the offenses therein specified as having been committed prior thereto.

3rd. The defendant is advised that the third paragraph of
174 the petition contains merely conclusions of law, to which it is not necessary for him to reply, but the defendant respectfully suggests that the legal conclusions therein stated are immaterial to the issue now before the court, and, further, that the representatives of the Government had amply time to institute a new prosecution in a regular and legal manner after the irregular and illegal procedure before the grand jury sitting at Erie for the March term, A. D. 1916, and before the running of the statute of limit-

4th. In reply to the fourth paragraph of the petition, it is admitted that the motion to quash said indictment was based, in part, upon the affidavits of members of the grand jury sitting in Pittsburgh at November term, 1915, and sitting in Erie at March term, 1916, respectively, setting forth the methods pursued by the United States attorney and the special assistant to the Attorney General in bringing before the said grand jury, sitting at Erie, without the knowledge or permission of the court, charges and counts which had been ignored by the said grand jury sitting at Pittsburgh, but the defendant alleges that these matters are properly matters of record and relate entirely to the procedure before and findings of said grand juries.

For further answer to said fourth paragraph of said petition, the defendant says that it was admitted by the representatives of the Government, and found by the court, that the procedure before said grand juries sitting at Pittsburgh and Erie, respectively, was substantially as follows:

At the session of the grand jury sitting at Pittsburgh for the November term, 1915, the court gave in charge of said grand jury the duty of inquiring into alleged offenses against the banking laws reported to have been committed by the defendant.

175 During the first, second, and third days of February, 1916, the United States attorney called before said grand jury, so as aforesaid sitting at Pittsburgh, a large number of witnesses, and after considering the testimony of said witnesses, said grand jury, on February 4th, 1916, made a presentment to the court sitting at Pittsburgh, setting forth that the defendant had misapplied certain of the moneys, funds, and credits of the First National Bank of Uniontown, Pennsylvania, and had made certain false entries in the books of said bank and in certain reports made to the Comptroller of the Currency, and had sworn falsely in connection with said reports.

On said fourth day of February, 1916, the court ordered and directed that the United States attorney prepare and present an indictment to the grand jury as recommended in said presentment.

Whereupon the United States attorney presented to said grand jury, so as aforesaid sitting in Pittsburgh, an indictment, containing forty-seven counts, charging the defendant with the offenses of unlawfully certifying checks against overdrawn accounts; false entries in books of bank; false entries in reports to comptroller; wilful and corrupt perjury; wilful misapplication; abstraction; and embezzlement; thirty of which counts charged the three offenses last named, to wit, wilful misapplication, abstraction, and embezzlement.

Upon the consideration of said indictment, the said grand jury ignored said thirty counts so as aforesaid charging wilful misapplication, abstraction, and embezzlement, and found said bill to be a true bill as to said remaining seventeen counts charging unlawfully certifying checks against overdrawn accounts; false entries in books of bank; false entries in reports to comptroller; and wilful and corrupt perjury.

176 Whereupon the United States attorney, instead of proceeding in the usual manner and having said bill containing said forty-seven counts returned to the court a true bill as to said seventeen counts thereof and not a true bill as to said thirty counts thereof, took from said bill thirty counts charging wilful misapplication, abstraction, and embezzlement, and said grand jury thereupon returned said indictment containing said remaining seventeen counts a true bill to No. 21, November term, 191., which indictment is now pending against the defendant.

Notwithstanding the fact that said grand jury, sitting at Pittsburgh, had ignored the charges against the defendant contained in

said thirty counts of said indictment charging wilful misapplication, abstraction, and embezzlement, the said United States attorney and said Special Assistant to the Attorney General, without the institution of any new proceedings in any way against the defendant, and without the knowledge or permission of the court, but of their own motion and in excess of their authority, and in derogation of the rights of the defendant, brought to the notice and attention of a subsequent grand jury, then and there sitting for the March term of said court at the city of Erie, the identical charges against the defendant which had been ignored as aforesaid by a prior grand jury sitting in the city of Pittsburgh, and proceeded to call witnesses before said grand jury, sitting at Erie, to testify against the defendant in support of said charges so as aforesaid ignored, many of whom had been called and examined by said Pittsburgh grand jury.

After the examination of said witnesses, said Erie grand
177 jury came into court on March 24th, 1916, and tendered to the court a presentment charging the defendant with wilful misapplication, abstraction, and embezzlement of the moneys, funds, and credits of the said First National Bank of Uniontown, Pennsylvania, which presentment contained a request to the court that the United States attorney be instructed to lay before said Erie grand jury a bill of indictment more particularly setting forth said violations of law.

Defendant is informed and believes, and therefore respectfully avers, that the honorable Charles P. Orr, the judge then presiding in said court at its said session in the city of Erie, upon the tendering of said presentment by said grand jury, expressed to said grand jury grave doubts as to the legality of an indictment based upon said presentment, the remarks of the court to the grand jury being, as defendant is informed, substantially as follows:

"This presentment presented by the grand jury is received by the court. The court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district, and they were authorized to present a bill embracing the matters which appear in this presentment. The court authorized them to bring in accordance with their presentment.

"This matter is again brought to this subsequent grand jury without the knowledge or the permission of the court, and the court is of the opinion that there should have been an application to this court for a resubmission of this matter to a new grand jury, or that some action of the court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done and inasmuch as you have made this presentment, the court will permit you to bring in a bill of indictment in accordance with the presentment, the court reserving, however, the legal question as to whether or not the indictment so brought in should be and remain a true bill against the defendant."

Defendant is further informed and belies that the above-
178 quoted remarks of the court were made in the presence and hearing of some of the representatives of the Government, who are now seeking a reargument of the motion to quash, and that said remarks were taken down by a stenographer in the employ of the Government, and that the transcript of the notes of said stenographer since that time has been in the possession of said representatives of the Government.

Pursuant to the permission of the court, and subject to the reservation made by the court, the said United States attorney and the said special assistant to the Attorney General then presented to the said grand jury, sitting at Erie, an indictment containing said thirty counts charging the defendant with the said offenses, namely, wilful misapplication, abstraction, and embezzlement of the funds of the said bank, which said thirty counts are identical with the thirty counts so as aforesaid ignored by the said prior grand jury sitting at Pittsburgh, which indictment containing said thirty counts was returned on said 24th day of March, 1918, a true bill to the above number and term, to wit, No. 17, March term, 1916, and which indictment is the indictment quashed by this court.

Defendant further showing that his motion to quash was based, inter alia, upon said unauthorized and illegal action on the part of the representatives of the Government in submitting, without the knowledge or consent of the court, to a subsequent grand jury charges against the defendant which had been ignored by a prior grand jury, avers that he was under no obligation to make his motion to quash said indictment until he was required to plead thereto.

5th. In reply to the fifth paragraph of said petition, the defendant avers that being under no obligation to make his motion to quash said indictment until called upon to plead thereto, there was
179 no occasion for setting forth in his motion the matters referred to in the first sentence of said paragraph.

In further reply to said fifth paragraph of said petition, the defendant denies the averments in the second sentence thereof as stated therein.

6th. In reply to the sixth paragraph of the said petition, the defendant admits that he entered into his recognizance for his appearance at the September term of said court, 1916, at Erie, Pennsylvania.

It is admitted that on December 30th, 1916, April 14th, 1917, and October 16th, 1917, the said cause was continued on the petitions of the defendant, his receivers, and the Josiah V. Thompson creditors' committee, but it is denied that said continuances were had "over the objection of the United States attorney," as averred.

It is also admited that the United States attorney "at no time prior to the filing of the said motion to quash requested or caused said cause to be continued," as averred in said sixth paragraph of said petition.

Defendant further answering said sixth paragraph of said petition avers that the facts therein stated are immaterial and irrelevant

to the issue now before the court, for the reason that the representatives of the Government had a right to call upon the defendant to plead to said indictment on any one of said dates, to wit, April 28th, 1916, December 30th, 1916, April 14th, 1917, and October 16th, 1917, notwithstanding said petitions for, and orders granting, said continuances.

7th. The seventh paragraph of said petition as a whole is an obvious attempt by the representatives of the Government to shift the responsibility for their illegal and unwarranted actions before the Erie grand jury from themselves to said grand jury, and
180 in so far as said paragraph undertakes to represent that said grand jury of its own initiative or volition requested that the United States attorney be directed to prepare and present an indictment, the said paragraph is absolutely denied.

The request that the United States attorney be instructed to lay before the grand jury a bill of indictment more particularly and at length setting forth said violations of law, which the representatives of the Government designate in said paragraph as a request of the foreman of the grand jury, is merely the usual, formal, and ordinary conclusion of the presentment, which presentment was based upon the testimony of said witnesses so as aforesaid illegally called and examined by the representatives of the Government before said grand jury, without the knowledge, permission, or authorization of the court.

8th. In reply to the eighth paragraph of said petition, which is vague and uncertain, the defendant is advised that said paragraph, as understood by his counsel, is a conclusion of law, and that he is not required to answer the same.

9th. The ninth paragraph of said petition is denied, and the defendant avers, on the contrary, that the order of court of March 24th, 1916, therein referred to, was made with the express reservation by the court of the question whether or not the said indictment should be and remain a true bill against the defendant.

10th. The conclusions stated in the tenth paragraph of said petition are denied, and the defendant, on the contrary, avers that the Special Assistant to the Attorney General therein referred to had, under the act of Congress therein quoted, and his authorization from the Attorney General, no greater powers than had the United
181 States attorney for this district, and that neither of said representatives of the Government had any right or authority to resubmit to the said Erie grand jury the charges against the defendant which had been ignored by the said Pittsburgh grand jury, without the permission and authorization of the court obtained from the court upon cause shown to the court.

11th. In reply to the eleventh paragraph of said petition, the defendant respectfully suggests that the mere effect of a judgment upon the desires, expectations, and hopes of the adverse party is not usually considered legal ground for the reversal of said judgment.

Further replying to said petition as a whole, the defendant says that he understands the burden of the same to be that the order quashing said indictment should be reversed, because the Government can not now proceed against the defendant on the alleged offenses specified in said indictment, by reason of the fact that the statute of limitations has run against a new prosecution for said offenses.

Assuming the correctness of the legal conclusions of the representatives of the Government to the effect that a new prosecution would be barred by the statute of limitations, the defendant, respectfully, replies that the situation in which the representatives of the Government now find themselves is due entirely to the method of procedure which they have elected to follow from time to time in this cause in, inter alia, the following particulars:

(a) The First National Bank of Uniontown, of which the defendant was president, having been closed, as set out in said petition, on January 18th, 1915, and the books, records, and papers thereof having been in the possession of representatives of the Govern-
182 ment from that date, and the United States attorney for this district having conducted a full investigation into the affairs of said bank and the alleged offenses of the defendant before the said grand jury sitting in Pittsburgh on the first, second, and third days of February, 1916, and having thus acquired full knowledge with reference to the details of the offenses upon which he sought the indictment of the defendant, there was nothing to prevent the representatives of the Government from making the usual and ordinary information before a United States commissioner, charging the defendant with the said offenses of misapplication, abstraction, and embezzlement of the funds of said bank even after said charges had been ignored by said Pittsburgh grand jury;

(b) Upon being warned by the presiding judge that the court had grave doubts about the validity of an indictment based upon said presentment made by the said Erie grand jury, there was nothing to prevent the representatives of the Government from then making an information in the orderly and usual way before a United States commissioner charging the defendant with said offenses;

(c) In view of the grave doubts expressed by the court upon the tendering of said presentment at Erie, as to the legality of the proceeding before the Erie grand jury, and in view of the reservation made at that time by the court, the representatives of the Government could and should have asked leave to nolle pros said indictment and institute a new proceeding in a legal manner;

(d) Even after having obtained the said indictment by the said illegal and unauthorized procedure before the said Erie grand jury, there was nothing to prevent the representatives of the Government from calling upon the defendant to plead to said indictment
183 at any one of the four occasions specified in the sixth paragraph of the petition, all of which dates were within the statutory period for the prosecution of said offenses.

Wherefore, defendant showing that his motion to quash was filed at a date as early as was incumbent upon him under the course of procedure elected by the representatives of the Government to be followed by them, and in view of the premises, prays that the said rule to show cause why a rehearing should not be had of the motion to quash be discharged.

(Signed) JOSIAH V. THOMPSON.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Josiah V. Thompson, being first duly sworn, deposes and says that he is the defendant above named and has signed the foregoing answer; that these allegations and statements contained therein are correct and true in so far as he has personal knowledge, and in so far as they are stated upon information, he verily believes them to be true.

(Signed) JOSIAH V. THOMPSON.

Sworn to and subscribed before me, this 24th day of May, A. D. 1918.

[SEAL.] (Signed) J. L. TREFALLEN, Jr.,
Notary Public.

My commission expires March 25, 1921.

184 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Memorandum.

Filed May 17, 1918. J. Wood Clark, clerk.

ORR, J.

The United States attorney has filed a motion for a rehearing upon a motion to quash the indictment in the above case and sets forth at length various reasons in support thereof. Without expressing all the causes moving the court to grant a rule to show cause why a rehearing should not be had, nor indeed anything to convey any intimation as to whether any of the reasons are sound, it is proper to state that the questions raised by the motion to quash are of great importance, that the motion to quash was filed on the eve of trial at the opening of the present term, that opportunity for consideration thereof upon the part of the United States attorneys and as well by the court may have been too limited, and especially because there was not presented or argued on behalf of the Government as now set forth in the motion for a reargument, that the motion to quash was filed too late to be of advantage to the defendant, therefore, a rule will be entered upon the defendant to show cause why a rehearing should not be had of the motion to quash.

185 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES,
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Demurrer to motion to quash.

And now, to wit, July 10, 1918, comes E. Lowry Humes, United States attorney for the Western District of Pennsylvania, and, as to the said motion to quash filed in the above entitled case by Josiah V. Thompson, admits for the purpose of this pleading that the facts therein set forth are true, and, further says, that the same and the matters therein contained in the manner and form as the same are pleaded and set forth are not sufficient in law to bar or preclude the United States from prosecuting the said indictment against the said Josiah V. Thompson, and that the United States are not bound to answer the same, and this the said E. Lowry Humes, United States attorney as aforesaid, is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said E. Lowry Humes for the United States prays judgment and asks that the said motion to quash may be dismissed and the said Josiah V. Thompson may be tried on the said indictment specified.

E. LOWRY HUMES,
United States Attorney.

186 In the District Court of the United States, for the Western District of Pennsylvania.

UNITED STATES,
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Order.

And now, to wit, May 25th, 1918, a rule to show cause for a rehearing having been granted on the motion to quash the indictment in the above entitled case, and the engagements of the court making it impossible to hear and dispose of the same within thirty days from the date of the judgment entered on the motion to quash May 8, 1918, it is hereby ordered and directed by agreement of counsel that final judgment entered on said motion to quash, May 8, 1918, be suspended, vacated and set aside pending the argument, and the disposition of the rule to show cause.

PER CURIAM.

187 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* JOSIAH V. THOMPSON.	No. 17. March term, 1916. Criminal docket.

Opinion sur motion to show cause why a rehearing should not be had of the motion to quash the indictment.

Filed Sept. 27" 1918. J. Wood Clark, clerk.

ORR, J.

The trial of this case was fixed by the court for the second day of the May term, 1918. On that day the defendant was first arraigned and required to plead to the indictment. Thereupon a motion was made to quash the indictment for various reasons set forth at that time and deemed sufficient by the court. The indictment was quashed, all of which appears by the stenographer's notes taken at that time. Subsequently the district attorney for the United States presented a motion to rehear the matter and to vacate the judgment of the court quashing the indictment upon that motion a rule to show cause was granted and to that motion the defendant subsequently filed his answer. The question before the court therefore is whether or not the motion to quash should be reargued. Before referring to the reasons advanced by the district attorney as inducements for a reargument, some comment is

188 necessary on the condition of the record. At No. 21 November term, 1915, a grand jury in this court had investigated and passed upon the very matters charged in the indictment found by a subsequent grand jury, which indictment this court quashed. The prior grand jury refused to find a true bill with respect to the counts, all of which and no more are embraced in the second indictment. The presentment of the first grand jury, although in general terms, was a sufficient foundation upon which an indictment embracing all the counts submitted to them might rest. Forty-seven separate counts were presented to the first grand jury. Of these seventeen were returned in a true bill. The remaining thirty counts were submitted to a subsequent grand jury without the permission of the court and were embodied in the bill which this court quashed. It was nowhere made to appear that additional evidence was forthcoming before the later grand jury or that there was any substantial reason why the second grand jury should be called upon to reconsider the acts of the former. With few exceptions, the counts in the second indictment relate to the same business transactions as appear in the first and involve the same sums of money. The first grand jury were content to charge false certification of checks, false entries in the books of the bank, and false swearing in affidavits to reports to the Controller of the Currency, and they were

not satisfied to charge misapplication, abstraction, and embezzlement of the moneys of the bank. The second grand jury, however, did charge the defendant with misapplication, abstraction, and embezzlement of the funds of the bank. The fact of the refusal
189 of the first grand jury to indict the defendant for the specific offenses and in the form set forth in the second indictment was admitted by the United States attorney at the time of the argument of the motion to quash the second indictment. Notwithstanding the investigation of the first grand jury, the Attorney General, on the 17th of March, 1916, addressed to a special assistant a letter, of which the following is the greater part:

"Under authority of the act of Congress approved June 30, 1906 (34 Stat., 816), you are hereby specifically authorized and directed to conduct grand jury proceedings in the Western District of Pennsylvania, in the case of United States v. Josiah V. Thompson, former president of the First National Bank of Uniontown, Pennsylvania, for violation of the national banking laws."

That authorization was submitted to the clerk of the court and marked filed by him on March 20, 1916, but was not placed among the records of the court nor brought to the attention of the court until the motion to quash had been decided when it was produced by the district attorney. On the 24th of March, the second presentment was made by the second grand jury. When it was received the judge expressed himself orally as follows:

"This presentment presented by the grand jury is received by the court. The court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district and they were authorized to present a bill embracing the matters which appear in this presentment. The court authorized them to bring in a bill in accordance with their presentment.

"This matter is again brought to this subsequent grand jury without the knowledge or the permission of the court, and the court is of the opinion that there should have been an application to this court for a resubmission of this matter to a new grand jury, or
190 that some action of the court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done and inasmuch as you have made this presentment, the court will permit you to bring in a bill of indictment in accordance with the presentment, the court reserving, however, the legal question as to whether or not the indictment so brought in should be and remain a true bill against the defendant."

On the same day, and a few minutes after, the second indictment was presented to the court. The substantial reason for sustaining the motion to quash the indictment as expressed at the time of such ruling was that the proceedings taken as they were without the knowledge, approval, or direction of the court having charge of the grand jury and their proceedings, were in violation of law and tended

to impair the substantial rights of the defendant. The court can not conceive that it was the intention of Congress by the passage of the act of June 30, 1906 (34 Stat., 816), referred to in the designation by the Attorney General to permit of a second investigation by a special assistant to the Attorney General where the first investigation, without the aid of such assistant but with the same evidence and witnesses, and resulted in a failure by the first investigating grand jury to indict. It was clearly not intended by Congress that pressure should be brought from the Department of Justice and exerted upon the new grand jury to do that which a former grand jury had declined to do. As it so happens, in the very record in this case is found a subsequent designation to a special assistant to the Attorney General under date of October 19, 1917, the substantial part of which is as follows:

"Your appointment as a special assistant to the Attorney General is hereby extended to include the case of the United States
191 v. Josiah V. Thompson pending in the Western District of Pennsylvania, and you are hereby authorized and directed to conduct grand jury proceedings in that district in connection with this case."

It is true it does not appear that any further grand jury proceedings have been instituted in pursuance of the designation last mentioned. The act under which the designations aforesaid must have been made provides:

"That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

That the court which by statute is required to direct the summoning of grand juries, and by statute also is authorized to discharge them, has full control over their proceedings is a principle of law which can not at this day be controverted. The resubmission of a case to the same or a new grand jury is often allowed by the court, but only upon some showing that such resubmission should be made in the interests of justice. To permit the submission of the same matter to repeated grand juries until one is found favorable to pressure of the prosecution would be violated of the substantial rights of citizens.

Returning now to the reason upon which the district attorney based his motion for a reargument of the motion to quash, we find that it is substantially the contention that the defendant's motion to
192 quash came too late. To this the court can not assent. The motion to quash was made before arraignment and before plea. It is true it was not made for a considerable time after the

second indictment was returned, but no steps were taken on behalf of the Government to correct the error pointed out by the court at the time the indictment was received. The representatives of the Government at that time should have presented a petition and laid the grounds, if any, for an order of the court permitting the resubmission of the matters to the grand jury, but no steps were taken by the Government in any way to remove the doubt with respect to the validity of the second indictment.

For the reasons thus expressed, the court must overrule the motion for a rehearing of the motion to quash, and must overrule a demurrer filed on behalf of the United States on July 10, 1918, to the motion to quash, and also direct judgment to be entered upon the motion to quash, the same having been suspended pending the disposition of this rule to show cause. It is well to add that the first indictment embracing seventeen counts still remains to be tried and that the object of the Government to punish the defandant for the alleged infractions of the national banking laws may be obtained in the trial of the case.

193 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES OF AMERICA,
vs.
JOSIAH V. THOMPSON.
No. 17. March term, 1916.

Order.

And now, to wit, October 19, 1918, it appearing of record in this case at the above number and term that the court did, on May 25th, 1918, make the following order, to wit:

"And now, to wit, May 25th, 1918, a rule to show cause for a rehearing having been granted on the motion to quash the indictment in the above-entitled case, and the engagements of the court making it impossible to hear and dispose of the same within thirty days from the date of the judgment entered on the motion to quash May 8, 1918, it is hereby ordered and directed by agreement of counsel that final judgment entered on said motion to quash, May 8, 1918, be suspended, vacated and set aside pending the argument, and the disposition of the rule to show cause."

And it further appearing of record in this case that after argument and submission the court, on September 27th, 1918, filed its opinion sur motion to show cause why a rehearsing should not be had of the motion to quash the indictment in the above-entitled case, and it appearing for the reasons given in said opinion that the court overruled the motion for a rehearing of the motion to quash, and overruled the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash, and also directed judgment to be entered upon the motion to quash, the same having been suspended

194 pending the disposition of the rule to show cause as shown in the above order of May 25th, 1918, it is, therefore, now at this time ordered and directed that final judgment be entered in this case as follows:

First. It is ordered and directed that the motion for a rehearing of the motion to quash the indictment in this case is hereby dismissed, and the rule to show cause heretofore granted be and the same is hereby discharged.

Second. It is ordered and directed that the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash be and the same is hereby overruled and dismissed.

Third. It is hereby ordered and directed that final judgment be entered in this case on the motion to quash, the judgment of May 8th, 1918, having been suspended, vacated, and set aside by the order of court of May 25th, 1918, above referred to, and the indictment is hereby quashed and it is further ordered that the United States shall have thirty days from the date of the entry of this judgment to sue out a writ of error to review the matter in the Supreme Court of the United States.

PER CURIAM.

195 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Indictment: Violation of banking laws; 1–20, wilful misapplication; 21–29, abstraction; 30, embezzlement.

E. Lowry Humes, attorney.

Judgment.

Oct. 19, 1918.

Order filed and entered directing that final judgment be entered as follows: First, that the motion for a rehearing of the motion to quash the indictment in the case is hereby dismissed, and the rule to show cause heretofore granted be and the same is hereby discharged; second, that the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash be and the same is hereby overruled and dismissed; and third, it is hereby ordered and directed that final judgment be entered in this case on the motion to quash, the judgment of May 8th, 1918, having been suspended, vacated, and set aside by the order of court of May 25, 1918, above referred to and that said indictment be quashed, and it is further ordered that the United States shall have thirty days from the date of the entry of

this judgment to sue out a writ of error to review the matter in the Supreme Court of the United States.

And now, Oct. 19th, 1918, pursuant to order of court this day filed and entered, final judgment sur motion to quash is hereby entered.

J. WOOD CLARK, *Clerk.*

196 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSIAH V. THOMPSON, DEFENDANT in error.
No. 17. March term, 1916.

Petition for writ of error.

Filed Oct. 26" 1918, J. Wood Clark, clerk.

And now comes the United States, plaintiff in error herein, and says that in accordance with the opinion filed on the 27th day of September, A. D. 1918, this court, on the 19th day of October, A. D. 1918, made its decision and judgment in favor of the defendant in error, Josiah V. Thompson, and against the plaintiff in error, the United States, holding said indictment insufficient, barring and quashing the same, and entering judgment accordingly, and in which proceedings and judgment in the said cause certain errors were committed to the prejudice of this plaintiff in error, and of such a character as to entitle this plaintiff in error under the law to review the said judgment and decision in the Supreme Court of the United States by a writ or error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff in error prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause,
197 duly authenticated, may be sent to the Supreme Court.

Dated the day of A. D. 1918.

R. L. CRAWFORD,
United States Attorney.
JOHN M. HENRY,
Assistant United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and

the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the court for this district under the seal of such district court pursuant to section 1004 of the Revised Statutes.

It is further ordered that the foregoing allowance of said writ of error shall operate as a supersedeas in said cause, and that the said defendant is hereby admitted to bail on his own recognizance in the sum heretofore fixed by the court.

Dated Pittsburgh, Pa., the 26th day of October, 1918.

CHAS. P. ORR,
District Judge.

198 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSIAH V. THOMPSON, DEFENDANT IN error.
No. 17. March term, 1916.

Assignment of errors.

Comes now the United States, plaintiff in error, in the above-entitled cause, and files these assignment of errors to the judgment heretofore entered by the United States District Court for the Western District of Pennsylvania in the above-entitled cause, to wit:

First. The said United States District Court for the Western District of Pennsylvania erred in sustaining the motion of the defendant in error that the indictment be quashed, and in rendering judgment for the defendant quashing and barring said indictment.

Second. The said United States District Court erred in overruling the motion filed by plaintiff in error on the 13th day of May, 1918, moving the court for a rehearing on the said motion to quash the indictment in said case, and moving the court to vacate and set aside the judgment of the said court quashing and barring the said indictment, No. 17, March term, 1916, in the above-entitled cause.

Third. The said United States District Court erred in overruling the demurrer filed by plaintiff in error, to the motion to quash, July 10, 1918, and in rendering judgment for the defendant quashing and barring said indictment, No. 17, March term, 1916, in the above-entitled cause.

199 Fourth. The said court for the Western District of Pennsylvania erred in holding that said indictment, No. 17, returned at the March term, A. D. 1916, of said court, was barred by reason of the matters specially pleaded in said motion to quash, and thereupon erroneously quashed and barred said indictment and entered judgment for the said defendant in error.

Fifth. The said court for the Western District of Pennsylvania in the above-entitled cause erred in ordering, adjudging, and decreeing that said indictment was barred without permission being first

obtained from the court by the prosecuting officer to submit said cause to said grand jury, and the said court for the Western District of Pennsylvania erred in entering judgment quashing and barring said indictment.

Sixth. And the said court for the said Western District of Pennsylvania erred in holding that due and lawful permission had not been obtained by the prosecuting officer and the grand jury prior to the filing of said indictment by the grand jury in open court, and thereupon quashing and barring said indictment.

Seventh. The said court for the Western District of Pennsylvania erred in holding that any lawful permission could now or hereafter be given to submit said cause to the grand jury for the Western District of Pennsylvania, and quashing and barring said indictment.

Eighth. The said District Court for the Western District of Pennsylvania erred in holding that the defendant could not be proceeded against according to law and the said cause submitted to a grand jury without being first given and permitted a preliminary examination or hearing before a commissioner or committing magis-
200 trate, and thereupon quashing and barring said indictment.

Ninth. The said court for the Western District of Pennsylvania erred in deciding and holding that—

"We have then a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant, who was not indicted by the first grand jury, which, according to its presentment, had not sufficient evidence before it to justify the indictment and which according to the facts as found contained the same matters as the later grand jury found in its indictment,"

and thereupon quashing and barring said indictment.

Tenth. The said court for the Western District of Pennsylvania erred in declaring and holding that—

"I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and, therefore, I must sustain the motion to quash the indictment found at Erie," when, in fact, no irregularities or prejudice to the defendant were charged in the said motion or shown in evidence upon the hearing to quash, and therefore erred in quashing and barring said indictment.

Eleventh. The said court for the Western District of Pennsylvania erred in holding that the control of the grand jury by common law and by statute law is under the court and the proceedings are under the control of the court, and thereupon quashing and barring said indictment.

Twelfth. The said court for the Western District of Penn-
201 sylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"At No. 21, November term, 1915, a grand jury in this court had investigated and passed upon the very matters charged in the indict-

ment found by a subsequent grand jury, which indictment this court quashed. The prior grand jury refused to find a true bill with respect to the counts, all of which and no more are embraced in the second indictment. The presentment of the first grand jury, although in general terms, was a sufficient foundation upon which an indictment embracing all the counts submitted to them might rest. Forty-seven separate counts were presented to the first grand jury. Of these seventeen were returned in a true bill. The remaining thirty counts were submitted to a subsequent grand jury without the permission of the court and were embodied in the bill which this court quashed,"

and thereupon quashing and barring said indictment.

Thirteenth. The said court for the Western District of Pennsylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"The substantial reason for sustaining the motion to quash the indictment as expressed at the time of such ruling was that the proceedings taken as they were without the knowledge, approval, or direction of the court having charges of the grand jury and their proceedings, were in violation of law and tended to impair the substantial rights of the defendant. The court can not conceive that it was the intention of Congress by the passage of the act of June 30, 1906 (34 Stat., 816), referred to in the designation by the Attorney General to permit of a second investigation by a special assistant to the Attorney General where the first investigation, without the aid of such assistant but with the same evidence and witnesses, and resulted in a failure by the first investigating grand jury to indict,"

and thereupon quashing and barring said indictment.

Fourteenth. The said court for the Western District of Pennsylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"We find that it is substantially the contention that the defendant's motion to quash came too late. To this the court can not assent.

The motion to quash was made before arraignment and before
202 plea. It is true it was not made for a considerable time after the second indictment was returned, but no steps were taken on behalf of the Government to correct the error pointed out by the court at the time the indictment was received. The representatives of the Government at that time should have presented a petition and laid the grounds, if any, for an order of the court permitting the resubmission of the matters to the grand jury, but no steps were taken by the Government in any way to remove the doubt with respect to the validity of the second indictment,"

and thereupon quashing and barring said indictment.

Fifteenth. The court for the Western District of Pennsylvania erred in considering the matter specially pleaded in said motion to quash said special matter, not appearing of record, in bar of said indictment, when, in fact, the indictment was returned and filed in open court on March 24, 1916, and all of the charges therein made

are now run and barred by the statute of limitations, and in quashing and forever barring said indictment, or the return by the grand jury of any other indictment against the defendant in error and said charges.

Sixteenth. Said motion to quash and the matters specially pleaded therein as a bar to said indictment was filed too late to be lawfully considered by said court and adjudged a bar to said indictment, and the court committed error in so doing.

Wherefore, the United States prays that the said judgment of the said United States District Court for the Western District of Pennsylvania be reversed and the said district court directed to reinstate the said indictment and proceed with the trial of the said cause according to law.

Dated the day of , 1918.

R. L. CRAWFORD,
United States Attorney.
JOHN M. HENRY,
Assistant United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

203 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSIAH V. THOMPSON, DEFENDANT IN error.
} No. 17. March term, 1916.

Bill of exceptions.

And now, to wit, November 18, 1918, comes the United States, plainiff in error in the above-entitled case, by R. L. Crawford, United States attorney, and excepts to the ruling of the court in the following particulars:

First. The said United States District Court for the Western District of Pennsylvania erred in sustaining the motion of the defendant in error that the indictment be quashed, and in rendering judgment for the defendant quashing and barring said indictment.

Second. The said United States District Court erred in overruling the motion filed by plaintiff in error on the 13th day of May, 1918, moving the court for a rehearing on the said motion to quash, the indictment in said case, and moving the court to vacate and set aside the judgment of the said court quashing and barring the said indictment, No. 17, March term, 1916, in the above-entitled cause.

Third. The said United States District Court erred in overruling the demurrer filed by plaintiff in error, to the motion to quash, July 10, 1918, and in rendering judgment for the defendant quashing and

barring said indictment, No. 17, March term, 1916, in the above-entitled cause.

204 Fourth. The said court for the Western District of Pennsylvania erred in holding that said indictment, No. 17, returned at the March term, A. D. 1916, of said court, was barred by reason of the matters specially pleaded in said motion to quash, and thereupon erroneously quashed and barred said indictment and entered judgment for the defendant in error.

Fifth. The said court for the Western District of Pennsylvania in the above entitled cause erred in ordering, adjudging, and decreeing that said indictment was barred without permission being first obtained from the court by the prosecuting officer to submit said cause to said grand jury, and the said court for the Western District of Pennsylvania erred in entering judgment quashing and barring said indictment.

Sixth. And the said court for the said Western District of Pennsylvania erred in holding that due and lawful permission had not been obtained by the prosecuting officer and the grand jury prior to the filing of said indictment by the grand jury in open court, and thereupon quashing and barring said indictment.

Seventh. The said court for the Western District of Pennsylvania erred in holding that any lawful permission could now or hereafter be given to submit said cause to the grand jury for the Western District of Pennsylvania, and quashing and barring said indictment.

Eighth. The said District Court for the Western District of Pennsylvania erred in holding that the defendant could not be proceeded against according to law and the said cause submitted to a grand jury without being first given and permitted a preliminary examination or hearing before a commissioner or committing

205 magistrate, and thereupon quashing and barring said indictment.

Ninth. The said court for the Western District of Pennsylvania erred in deciding and holding that—

"We have then a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant, who was not indicted by the first grand jury, which according to its presentment, had not sufficient evidence before it, to justify the indictment and which according to the facts as found contained the same matters as the later grand jury found in its indictment,"

and thereupon quashing and barring said indictment.

Tenth. The said court for the Western District of Pennsylvania errer in declaring and holding that—

"I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and therefore, I must sustain the motion to quash the indictment found at Erie," when, in fact, no irregularities or prejudice to the defendant were

charged in the said motion or shown in evidence upon the hearing to quash, and therefore erred in quashing and barring said indictment.

Eleventh. The said court for the Western District of Pennsylvania erred in holding that the control of the grand jury by common law and by statute law is under the court and the proceedings are under the control of the court, and thereupon quashing and barring said indictment.

Twelfth. The said court for the Western District of Penn-
206 sylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"At No. 21, November term, 1915, a grand jury in this court had investigated and passed upon the very matters charged in the indictment found by a subsequent grand jury, which indictment this court quashed. The prior grand jury refused to find a true bill with respect to the counts, all of which and no more are embraced in the second indictment. The presentment of the first grand jury, although in general terms, was a sufficient foundation upon which an indictment embracing all the counts submitted to them might rest. Forty-seven separate counts were presented to the first grand jury. Of these seventeen were returned in a true bill. The remaining thirty counts were submitted to a subsequent grand jury without the permission of the court and were embodied in the bill which this court quashed," and thereupon quashing and baring said indictment.

Thirteenth. The said court for the Western District of Pennsylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"The substantial reason for sustaining the motion to quash the indictment as expressed at the time of such ruling was that the proceedings taken as they were without the knowledge, approval or direction of the court having charge of the grand jury and their proceedings, were in violation of law and tended to impair the substantial rights of the defendant. The court cannot conceive that it was the intention of Congress by the passage of the act of June 30, 1906 (34 Stat., 816), referred to in the designation by the Attorney General to permit of a second investigation by a special assistant to the Attorney General where the first investigation, without the aid of such assistant but with the same evidence and witnesses, and resulted in a failure by the first investigating grand jury to indict,"
and thereupon quashing and barring said indictment.

Fourteenth. The said court for the Western District of Pennsylvania erred in deciding and holding in its opinion filed September 27, 1918, that—

"We find that it is substantially the contention that the defendant's motion to quash came too late. To this the court can not assent.

The motion to quash was made before arraignment and before
207 plea. It is true it was not made for a considerable time after the second indictment was returned, but no steps were taken on behalf of the Government to correct the error pointed out by the

court at the time the indictment was received. The representatives of the Government at that time should have presented a petition and laid the grounds, if any, for an order of the court permitting the resubmission of the matters to the grand jury, but no steps were taken by the Government in any way to remove the doubt with respect to the validity of the second indictment,"
and thereupon quashing and barring said indictment.

Fifteenth. The court for the Western District of Pennsylvania erred in considering the matter especially pleaded in said motion to quash said special matter, not appearing of record, in bar of said indictment, when, in fact, the indictment was returned and filed in open court on March 24, 1916, and all of the charges therein made are now run and barred by the statute of limitations, and in quashing and forever barring said indictment, or the return by the grand jury of any other indictment against the defendant in error and said charges.

Sixteenth. Said motion to quash and the matters specially pleaded therein as a bar to said indictment was filed too late to be lawfully considered by said court and adjudged a bar to said indictment, and the court committed error in so doing.

The foregoing exceptions granted at the request of the United States, and bill sealed.

CHAS. P. ORR,
Judge of the District Court of the United States for the Western District of Pennsylvania.

(Endorsed:) No. 17, March T. 1916. In the District Court of The United States for the West. Dist. of Penn'a. United States, plaintiff in error, vs. Josiah V. Thompson, defendant in error. Bill of exceptions. Filed Nov. 18, 1918. J. Wood Clark, clerk. R. L. Crawford, U. S. attorney.

209 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
v.
JOSIAH V. THOMPSON, DEFENDANT in error. } No. 17. March term, 1916.

Citation in error.

To JOSIAH V. THOMPSON, *greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Pennsylvania sitting at Pittsburgh, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, judge of the District Court of the United States for the Western District of Pennsylvania, this 26 day of Oct., 1918.

CHAS. P. ORR,
Judge of the United States District Court
for the Western District of Pennsylvania.

210 Service of the foregoing citation is hereby acknowledged this 28 day of October, 1918.

JOSIAH V. THOMPSON.

211 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
JOSIAH V. THOMPSON, DEFENDANT in error.
No. 17. March term, 1916.

Præcipe.

To the clerk of the District Court of the United States
for the Western District of Pennsylvania:

In the above entitled cause you will please prepare transcript of the record to be filed in the office of the clerk of the Supreme Court of the United States under the writ of error heretofore perfected to said court, and include in said transcript the following papers on file herein:

1. Proceedings, if any of record, relating to the grand jury leading up to the presentment.
2. The presentment.
3. The indictments at Nos. 21, November term, 1915, and 17, March term, 1916.
4. Journal entries showing record of return of indictments into court, and the several continuances, and on whose petition they were made and by what judge ordered.
5. Recognizance of defendant of April 28, 1916.
6. Copies of motion to quash and opinion of court quashing same.
7. Copy of motion to vacate and set aside, and answer of defendant to same.
8. Memorandum of court.
9. Copy of demurrer filed July 10, 1918, and copy of order of court of May 25, 1918.

212 10. Copy of opinion of court filed September 27, 1918, and copy of order of court filed October 19, 1918.

11. Order settling and certifying bill of exception.

12. Petition for writ of error.
13. Assignment of errors.
14. Order allowing writ of error.
15. Writ of error.
16. Citation in error.
17. Præcipe for transcript.
18. Bill of exceptions.
19. Certificate of clerk to transcript of record.

Dated the day of , 1918.

_____,
United States Attorney.

_____,
Assistant United States Attorney.

_____,
Special Assistant to the Attorney General.

213 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
JOSIAH V. THOMPSON. } No. 17. March term, 1916.

Attorney, E. Lowry Humes.

Certificate.

I, J. Wood Clark, clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct transcrip of the record sur writ of error so full and entire as the same remains of record as set forth in the præcipe for record sur writ of error in the above-entitled case on file in my office, in the city of Pittsburgh, in said district.

Witness my hand and the seal of said court this 19th day of Nov., A. D. 1918.

[SEAL.] J. WOOD CLARK, *Clerk.*

(Endorsed on cover:) File No. 26841. W. Pennsylvania D. C. U. S. Term No. 755. The United States of America, plaintiff in error, vs. Josiah V. Thompson. Filed November 30th, 1918. File No. 26841.

C

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, plaintiff in error, v. JOSIAH V. THOMPSON. } No. 755.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled case for hearing at the opening of the next term.

The case is here on writ of error by the United States under the provisions of the Criminal Appeals Act (34 Stat. 1246), to review a judgment sustaining a motion to quash an indictment which charged the defendant in error, then president of the First National Bank of Uniontown, Pa., with misapplication of the funds of the bank in violation of the national banking laws.

Notice of this motion has been served upon opposing counsel.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

119738—19

Office Supreme Court, U. S.
FILED
OCT 4 1919
JAMES D. MAHER,
CLERK.

NO. 250.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,

PLAINTIFF IN ERROR.

VS.

JOSIAH V. THOMPSON,

DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF IN SUPPORT THEREOF.

J. E. B. Cunningham,
R. M. Gibson,
W. C. McKean,
Attorneys for Defendant in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
v.
JOSIAH V. THOMPSON,
Defendant in Error.

No. 250.

In Error to the District Court of the United States for the Western District of Pennsylvania.

MOTION TO DISMISS WRIT OF ERROR.

And now, October 12, 1919, comes Josiah V. Thompson, defendant in the above styled case, by his attorneys, J. E. B. Cunningham, R. M. Gibson and W. C. McKean, and respectfully moves the Court to dismiss the writ of error heretofore allowed in this cause for the following reason, viz:

The decision or judgment of the Court below, quash-

ing the indictment in this case, is *not* of such a character as to entitle the United States to have said decision or judgment reviewed by writ of error, under the provisions of the Act of March 2, 1907, C. 2564, 34 Stat. 1246, in that,

(a.) The decision or judgment of the Court below, quashing the indictment in this case, is *not* "based upon the invalidity or construction of the statute upon which the indictment is founded."

(b.) The decision or judgment appealed from is *not* "a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded."

(c.) The decision or judgment appealed from is *not* a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

J. E. B. CUNNINGHAM,
R. M. GIBSON,
W. C. MCKEAN,
Attorneys for Josiah V. Thompson,
Defendant in Error.

NOTICE OF SUBMISSION OF MOTION TO DISMISS WRIT OF ERROR.

To Honorable A. C. King, Solicitor General for the United States, Plaintiff in Error:

PLEASE TAKE NOTICE that the foregoing motion, together with the brief of argument hereto attached, will be submitted to the Supreme Court of the United States on Monday, the 6 day of October, 1919, at the Capitol, in the City of Washington, D. C., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

J. E. B. CUNNINGHAM,
R. M. GIBSON,
W. C. MCKEAN,
Attorneys for Defendant in Error.

Service of above notice, with copy of said motion and brief attached, accepted September 13 1919.

(Signed) Alex C. King.
Solicitor General

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

THE UNITED STATES OF AMERICA, Plaintiff in Error, v. JOSIAH V. THOMPSON, Defendant in Error. } No. 250.

In Error to the District Court of the United States for the Western District of Pennsylvania.

STATEMENT OF FACTS UPON WHICH DEFENDANT'S MOTION IS BASED.

(1.) On January 18, 1915, the First National Bank of Uniontown, Pa., situated and doing business in the Western District of Pennsylvania, was closed by order of the Comptroller of the Currency, and all its books, records and papers passed into the possession of representatives of the government.

(2.) It being alleged by the representatives of the government that an examination of said books anp

records disclosed that Josiah V. Thompson, the defendant in error in this appeal, had, as president of said bank, committed various violations of the banking laws of the United States, the United States attorney for said district, instead of having an information made before a United States Commissioner, requested the presiding judge of the District Court of the United States for the Western District of Pennsylvania, sitting for the November term, 1915, in the City of Pittsburgh, Pa., to call the attention of the grand jury, in attendance for said term in said city, to said allegations, and to direct said grand jury to inquire into the same; whereupon said court gave the matter in charge of said grand jury.

(3.) During the first, second and third days of February, 1916, the said grand jury heard certain witnesses previously subpoenaed by the representatives of the government, and, on February 4th, 1916, made its presentment to said court at No. 21 November term, setting forth that on the 15th day of October, 1914, and at divers other times and dates prior thereto and thereafter, the said Josiah V. Thompson wilfully misapplied certain of the moneys, funds and credits of the said bank "and did make and cause to be made, certain false entries, both in the books of said bank and in certain reports made to the Comptroller of the Currency, and in addition thereto did swear falsely in connection with certain of said reports made to the Comptroller of the Currency;" and requesting that the United States attorney be instructed to lay before it a bill or bills of indictment

more particularly and at length setting forth said violations of law (Printed record, p. 5.)

(4.) Thereupon the United States attorney for said district forthwith laid before said grand jury an indictment containing 47 counts (Opinion of Court below, printed record, p. 94,) 17 of which counts charged unlawful certification of checks, false entries in books of the bank and in reports to the Comptroller, and false swearing in affidavits to reports to the Comptroller of the Currency, and the remaining 30 counts charged misapplication, abstraction and embezzlement of the moneys of said bank (Opinion of the Court below, printed record, pp. 94-95.)

(5.) The said grand jury so as aforesaid sitting for the said November term, at Pittsburgh, refused to indict the said Josiah V. Thompson on said 30 counts charging misapplication, abstraction and embezzlement of the moneys of said bank (Opinion of the Court below, printed record, p. 95;) but were willing to indict said defendant upon said 17 counts charging the unlawful certification of checks, false entries in the books of the bank and in reports to Comptroller, and perjury.

Whereupon the said United States attorney for said district withdrew from said grand jury said indictment containing said 47 counts and presented to it a new indictment containing only the said 17 counts of said original indictment charging unlawful certification of checks, false entries in books of the bank and in reports

to Comptroller and perjury, which indictment (Printed record, p. 8-30) was returned a true bill to No. 21 November term, 1915, of said court, and is the indictment referred to in this case as the "Pittsburgh Indictment."

(6.) Under date of March 17, 1916, the Attorney General addressed a letter to Mr. Wrisley Brown, stating that under authority of the Act of Congress approved June 30, 1906, the said Wrisley Brown was specifically authorized and directed to conduct grand jury proceedings in the western district of Pennsylvania, in the case of United States vs. Josiah V. Thompson, former president of the First National Bank of Uniontown, Pennsylvania, for violation of the National Banking Laws (Printed record, p. 4.) This authorization was submitted to the Clerk of the Court and marked filed by him on March 20, 1916, but was not placed among the records of the Court, nor brought to the attention of the trial court until the motion to quash had been decided, when it was produced by the District Attorney (Opinion of Court below, printed record, p. 95.)

(7.) The next term of the said District Court of the United States for the Western District of Pennsylvania was the March term, 1916, and the sessions of said court were held in the City of Erie in said district.

(8.) On or prior to March 24, 1916, the United States attorney for said district and the said special rep-

resentative of the Attorney General "without the knowledge, approval or direction of the Court having charge of the grand jury and their proceedings" (Opinion of Court below, printed record, p. 95) conducted before the grand jury, summoned for and attending upon the said March term of said court held in the said City of Erie, another and separate investigation into the said allegations that the said Josiah V. Thompson had, as the former president of the said First National Bank of Uniontown, Pa., committed violations of the banking laws of the United States, and recalled before the said grand jury, sitting at Erie, practically all of the witnesses who had testified before the previous grand jury sitting in the City of Pittsburgh.

(9.) On March 24, 1916, the said grand jury sitting at Erie made its presentment to said Court setting forth that on the 15th day of October, 1914, and at divers times and dates prior thereto and thereafter, the said Josiah V. Thompson, then president of the First National Bank of Uniontown, Pa., "did wilfully misapply and abstract certain of the moneys, funds and credits of the said First National Bank of Uniontown, Pa." In the presentment, after stating that the aforesaid violations of law had come to the knowledge of the said grand jury through the evidence of certain witnesses sworn before it, the said grand jury further requested that the United States attorney be instructed to lay before it a bill or bills of indictment, more particularly and at length, setting forth said violations of law (Printed record, p. 31.)

(10.) Upon the presentation of this presentment to the Honorable Charles P. Orr, the District Judge then presiding in said Court, he expressed himself orally as follows:

> "This presentment presented by the grand jury is received by the Court. The Court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district and they were authorized to present a bill embracing the matters which appear in this presentment. The Court authorized them to bring in a bill in accordance with their presentment.
>
> "This matter is again brought to this subsequent grand jury without the knowledge or the permission of the Court, and the Court is of the opinion that there should have been an application to this Court for a resubmission of this matter to a new grand jury, or that some action of the Court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done, and inasmuch as you have made this presentment, the Court will permit you to bring in a bill of indictment in accordance with the presentment, the Court reserving, however, the legal question as to whether or not the indictment so brought in should be and remain a true bill against the defendant." (Opinion of Court below, printed record, p. 95.)

(11.) The said representatives of the government thereupon presented to said Erie grand jury an indictment containing only the identical above mentioned

thirty counts charging misapplication, abstraction and embezzlement of the moneys of said bank, which had been so as aforesaid ignored by the previous grand jury sitting at Pittsburgh (Opinion of Court below, printed record, p. 94) and the said grand jury on said 24th day of March, 1916, returned an indictment containing said thirty counts, which is found in the printed record at pp. 32 to 76, and is referred to in this case as the "Erie Indictment."

(12.) The said indictments were listed for trial upon several occasions, but the cases were continued on December 30, 1916, April 14, 1917, and October 16, 1917, on the petitions of the defendant, his Receivers, and the Josiah V. Thompson Creditors' Committee.

(13.) On October 19, 1917, the Attorney General under authority of said Act of Congress of June 30, 1906, (34 Stat. 816) extended the appointment of Sylvester R. Rush, Esq., to include the case of the United States vs. Josiah V. Thompson and authorized and directed him to conduct grand jury proceedings in the western district in connection with said case (Opinion of Court below, printed record, p. 96.)

(14.) Both indictments were listed for trial at Pittsburgh on the 2nd day of the May term, 1918, to wit, May 7th, 1918, and upon that date the defendant was for the first time called upon by the government to plead to said indictments, it being the purpose of the government

to try the defendant on both indictments at the same time.

(15.) Upon being called upon to plead to said indictments, the defendant, through his attorneys, before plea pleaded and jury sworn, filed motions to quash each of said indictments, the motion to quash the "Erie Indictment" being found at p. 77 of the printed record. The motion to quash the "Pittsburgh Indictment" is not included in the record now before the Court. The reasons therein assigned were not deemed sufficient by the Court to entitle the defendant to have this indictment quashed and it therefore remains for trial in the Court below.

(16.) After argument, the Court, on May 8, 1918, overruled the motion of the defendant to quash the "Pittsburgh Indictment" at No. 21 November term, 1915, but sustained the defendant's motion to quash the "Erie Indictment" at No. 17 March term, 1916, for the reasons stated by the Court at pp. 79 to 82 of the printed record.

(17.) On May 17, 1918, the representatives of the government moved the Court for a re-hearing on the motion to quash the said "Erie Indictment" and to vacate and set aside the judgment quashing said indictment (Printed record, pp. 82 to 85.)

(18.) On the same day the said Honorable Charles P. Orr, presiding in said Court, filed a memorandum en-

tering a rule upon the defendant to show cause why a re-hearing should not be had of the motion to quash, (Printed record, p. 92.)

To this rule the defendant filed his answer on May 25th, 1918 (Printed record, pp. 86 to 92.)

On the same day the Court ordered and directed, pursuant to an agreement of counsel, that the said judgment entered on May 8, 1918, quashing said indictment be suspended, vacated and set aside pending the argument and the disposition of said rule to show cause (Printed record, p. 93.)

(19.) On July 10, 1918, the United States attorney for said district filed a demurrer to said motion to quash said indictment (Printed record, p. 93.)

(20.) Argument having been had upon said rule and answer, the said Honorable Charles P. Orr, presiding in said Court, on September 27, 1918, filed an opinion (Printed record, pp. 94 to 97) overruling the motion for a re-hearing of the motion to quash, and overruling the demurrer filed on behalf of the United States to the motion to quash, and directing judgment to be entered upon the motion to quash, which had been suspended pending the disposition of said rule for a re-hearing.

(21.) On October 19, 1918, the Court entered its final judgment discharging the rule to show cause why a re-hearing should not be had on the motion to quash the indictment, dismissing said motion for a re-hearing,

overruling the demurrer and ordering and directing that final judgment be entered quashing said indictment (Printed record, pp. 97-98.)

(22.) On October 26, 1918, the United States sued out the present writ of error from the said District Court of the United States for the Western District of Pennsylvania to the Supreme Court of the United States (Printed record, pp. 99-100.)

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

THE UNITED STATES OF AMERICA, Plaintiff in Error, v. JOSIAH V. THOMPSON, Defendant in Error.	No. 250.

In Error to the District Court of the United States for the Western District of Pennsylvania.

DEFENDANT'S BRIEF OF ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

Statement of the Question Involved in Defendant's Motion.

Is the decision or judgment of the Court below, quashing the indictment in this case, reviewable under the provisions of the Act of March 2, 1907, c. 2564, 34 Stat. 1246?

ARGUMENT.

IN SUPPORT OF DEFENDANT'S MOTION IT IS SUBMITTED:

Point I, and Generally.

THE UNITED STATES HAS NO *GENERAL* RIGHT TO PROSECUTE THE WRIT:

> "There is *no general right* of appeal to the Supreme Court in Criminal Cases in the United States Courts, such right existing *only* where conferred by statute."
>
> Byrne's Fed. Crim. Proced. 220,—citing UNITED STATES VS. PERRIN, 131 U. S. 55 (1889).

In this case, the Supreme Court, in considering a certificate of division in opinion from the District Court of California, say:

> "The system of criminal law of the United States *does not* contemplate *a general right* of appeal from the Courts trying criminals in this court."

See also note to case of UNITED STATES VS. STEVENSON et al., U. S. Sup, Ct. Rpts. 54 Law Ed. 153, as follows:

> "The right of the United States to sue out a writ of error in criminal cases, directed to a Circuit or District Court is *solely derived* from the Act of March 2, 1907, (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209.)"
>
> "Outside the right granted by the above men-

tioned Statute (Act of March 2, 1907) the United States has no appeal in criminal cases."

Byrne's Fed. Crim. Proceedure 222,—citing UNITED STATES vs. DICKINSON 213 U. S. 92, (Certiorari to to the Circuit Court of Appeals for the first Circuit) (1909.)

From the Syllabi:

"The Act of March 2, 1907, c. 2564, 34 Stat. 1246, giving an appeal to the Government in certain criminal cases, can not be extended beyond its terms, or construed so as to extend the power of certiorari under the Act of March 3, 1891, c. 517, 26 Stat. 826 to bring up a criminal case for the correction of mere error at the instance of the United States. Writ of Certiorari dismissed."

This case hinged upon a consideration of the Act of March 3, 1891, providing for the issuing of writs of certiorari, but in the opinion of the Court, delivered by MR. CHIEF JUSTICE FULLER, it was said:

"The construction of the Act of 1891 must be arrived at without reference to such recent legislation as the Act of Congress of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error in certain instances in criminal cases. * * *

"*So far as that statute (Act of March 2, 1907) is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.*"

Act of March 2, 1907:

The Act above referred to is as follows:

"BE IT ENACTED, &c., That a writ of error may be taken by and on behalf of the United States from

the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any Indictment, or any count thereof, *where such decision or judgment is based upon the invalidity or construction of the statute upon which the Indictment is founded.*

"From a decision arresting a judgment of conviction for insufficiency of the Indictment, *where such decision is based upon the invalidity or construction of the statute upon which the Indictment is founded.*

"From the decision of judgment *sustaining a special plea in bar, when the defendant has not been put in jeopardy.*

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has beem rendered and shall be diligently prosecuted *and shall have precedence over all other cases.*

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: PROVIDED, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

Point II.

IT NECESSARILY FOLLOWS that, if the decision or judgment complained of is reviewable under the present writ of error, it must be

(A), a decision or judgment "*based upon the inva-*

lidity or construction of the statute upon which the indictment is founded", or,

(B), a decision or judgment "*sustaining a special plea in bar, where the defendant has not been put in jeopardy,*" *because,* in as much as the decision or judgment complained of was the quashing of the indictment before plea pleaded or jury sworn, *it could not be* "a decision arresting a judgment of conviction,"—*the only other* decision reviewable under the Act.

Point III.

A review of the record and proceedings establishes the *fact* that the judgment complained of is *not* a decision or judgment "*based upon the invalidity or construction of the statute upon which the indictment is founded.*"

The Indictment:

The indictment quashed by the Court below contained thirty counts, charging as follows:

Counts 1 to 20, inclusive, WILFUL MISAPPLICATION,

Counts 21 to 29, inclusive, ABSTRACTION,

Count 30, EMBEZZLEMENT, of the funds of a national bank.

(See page 32 of Transcript of Record.)

The Act Upon which the Indictment is Founded:

"Every president * * * of any association (banking association) who *embezzles, abstracts,* or *wilfully misapplies* any of the moneys, funds, or credits of the association, * * * with intent, in either case, to injure or defraud the association * * * shall be deemed guilty, &c., &c."

R. S. 5209.

The Motion to Quash Indictment:

(See page 77 of Transcript of Record.)

"And now, May 7th, 1918, Josiah V. Thompson, defendant in the above entitled cause, comes into court, and, by his counsel, respectfully moves the Court to quash the indictment in this cause for the reasons following:

"1. That said indictment was not based upon any preliminary accusation or complaint, verified under oath, upon which accusation the defendant had a hearing before a committing magistrate,—whereby defendant was deprived of his constitutional right to demand and be informed of the nature and cause of the accusation against him, and to meet and be confronted with the witnesses against him.

"2. That said indictment was returned 'a true bill' and filed in this court March 24th, 1916, upon and pursuant to a presentment made to said court, on the same day, by the United States Grand Jury for said district, while said court was sitting at the City of Erie, in said district,—which said presentment was not made from the *personal knowledge* of any of the grand jurors, *nor from the testimony of witnesses sent before the said grand jury by leave of, or by order of the court.*

"3. The indictment is not supported or warranted by the presentment of the grand jury upon which it is based.

"4. The knowledge upon which said presentment was so made, came to said grand jury 'through the evidence of certain witnesses' *called before said grand jury by the United States Attorney without the order or permission of the court;* and *the subject matter* of said presentment *was not called to the attention of*, or *given in charge*, or *submitted to the grand jury by the Court.*

"5. That theretofore, to-wit, on or about the first, second and third days of Feb. A. D., 1916, after first having their attention called to the matter by the court, a *prior* United States grand jury then sitting for said district, at the City of Pittsburgh, in said District, heard certain witnesses, called before said grand jury by the United States Attorney, with the permission of or by order of said court, of and concerning the same subject matter comprised and embraced in said presentment, afterwards, and as aforesaid, returned into said court at said City of Erie, and likewise contained and embraced in the several counts in said indictment, afterwards, and as aforesaid, returned 'a true bill' at said City of Erie on March 24th, A. D., 1916.

"That said grand jury, so sitting at said City of Pittsburgh, and so having heard said witnesses, did, on Feb. 4, 1916, make a presentment to said court at Pittsburgh, covering a part of the same subject matter as is contained in said later presentment, so as aforesaid, and afterwards, made to said court at the City of Erie, to-wit, the charge of 'willful misapplication etc.,' *but refused* to include in said Pittsburgh presentment that said defendant had 'willfully *embezzled and abstracted* certain of the moneys, funds and credits of the said First National Bank of Uniontown, Pennsylvania.' That pursuant to said presentment so made at Pittsburgh, the United States Attorney did, by order of court, on Feb 4, 1916, lay before said grand jury at Pittsburgh an indictment

against said defendant containing *forty-seven* counts or charges, alleging violations of the national banking laws, —*thirty of which counts were rejected* by said grand jury, and upon which they *refused* to find a true bill; that said thirty counts, so rejected, charged said offenses of '*willful misapplication etc.*,' '*embezzlement*' and '*abstraction etc.*'

"That thereafter, to-wit, Feb. 7th, 1916, said United States Attorney withdrew said bill from before said grand jury at Pittsburgh, and, on the same day, laid another bill against said defendant before said grand jury, containing seventeen counts, none of which counts charged either of the offenses of 'willful misapplication etc.,' 'embezzlement' or 'abstraction etc.,' and which bill was on the same day, returned into said court at Pittsburgh 'a true bill.'

"That said *thirty counts* against said defendant contained in said indictment, so as aforesaid rejected by said grand jury sitting at the City of Pittsburgh, on Feb. 7, 1916, *are identical* with the matter contained and embraced in the thirty counts comprising and making up the indictment against said defendant, so as aforesaid, returned 'a true bill' against him, on March 24, 1916, by the later grand jury, so as aforesaid, sitting at the City of Erie, and that most of the witnesses, if not all of them, so as aforesaid called and examined, by the said grand jury at the City of Erie, were called and examined, as aforesaid, before said prior grand jury at the City of Pittsburgh.

"6. After this indictment was prepared and presented to the Grand Jury, pursuant to the order of court of March 24th, 1916, no witnesses were called or sworn or examined before said Grand Jury touching or concerning the charges therein contained.

"Wherefore, defendant tendering herewith the affidavits of Robert I. Patterson and George L. Dawson, members of said Pittsburgh and Erie Grand Juries, respectively, in support of the facts hereinbefore averred, which do not appear of record, and offering to prove said

facts by depositions or in any manner that the Court may direct, prays judgment on said indictment and that the same may be quashed."

From the Ruling of the Court May 8, 1918, on Motion to Quash Indictments:

(See page 79 of Transcript of Record.)

"On the motions to quash the indictments, the following ruling was made:

BY THE COURT: "In the brief time given to the court for the consideration of these motions, elaboration of opinion can not be made.

"I am satisfied that, with respect to the indictment at No. 21 November term, 1915, called the 'Pittsburgh Indictment,' no substantial rights of the defendant have been invaded. And therefore the motion to quash the indictment at No. 21 November term, 1915, is overruled and an exception as to such ruling is noted to the defendant.

"With respect, however to the motion to quash the indictment designated in the argument as the 'Erie Indictment,' at No. 17 March term, 1916, this court has reached a *different conclusion.*

"It appears that the matters embraced within that indictment were the *identical matters* submitted to the grand jury which found the former bill at Pittsburgh, in addition to the matters specially charged in that bill.

"It appears further that *those matters* were not included in the indictment at the Pittsburgh term, and *were not deemed* by that grand jury to be *charges for which the defendant should be brought to trial.*

"*The resubmission* of those matters to the later grand jury at the Erie term was *without* the knowledge or approval of the court. The *resubmission* of the offenses against the Government to a new grand jury *is a matter of*

highest prerogative, and is always subject to the control of and, in proper cases, always granted by the court.

"In this case, it does not now appear that there was an absence of evidence when those matters were first submitted at Pittsburgh; it does not appear of record that any application to the court was made for a resubmission of those matters to the Erie grand jury.

"Again, it appears from briefs of counsel acting on behalf of the Government in this case, and from statements made by them, that there was a special designation by the Attorney General, or some one, to attend the sessions of the grand jury at Erie and proceed with the investigation.

"We have, then, a *subsequent introduction* of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, *without the approval* or *without* the *permission* of the court, and perhaps *to the prejudice* of the defendant, who was not indicted by the first grand jury, which, according to its presentment, had not sufficient evidence before it, to justify the indictment, and which, according to the facts as found, contained the same matters as the later grand jury found in its indictment.

"I am satisfied that *the matters* in connection with the finding of the indictment at Erie *were more than irregularities* and, *therefore, I must sustain the motion to quash the indictment found at Erie*, and note an exception to the Government. * * * ".

Thereafter, May 17, 1918, the United States by its attorneys presented and filed a petition for rehearing and to vacate the judgment quashing the indictment. (See page 82 of Transcript of Record.)

A rule to show cause was granted. (See page 85 of Transcript of Record.)

May 25, 1918, defendant filed his answer to this rule. (See page 86 of Transcript of Record.)

Same day, May 25, 1918, by agreement of counsel, the Court ordered and directed "that final judgment entered on said motion to quash, May 8th, 1918, be suspended, vacated and set aside pending the argument and disposition of the rule to show cause." (See page 93 of Transcript of Record.)

July 10, 1918, E. Lowry Humes, United States Attorney, filed a demurrer to the motion to quash, *admitting, of course, the facts in said motion set forth to be true.* (See page 93 of Transcript of Record.)

Reason for Quashing Indictment:

Subsequently in an opinion filed Sept. 27th, 1918, (See Trans. of Record, page 94) the Court below set forth at length its *reasons* for sustaining the motion to quash the indictment. This *opinion* and the *order* and *judgment* made and entered thereon are as follows:

Opinion:

Orr, J.—"The trial of this case was fixed by the Court for the second day of the May term, 1918. On that day the defendant was first arraigned and required to plead to the indictment. Thereupon a motion was made to quash the indictment for various reasons set forth at that time and deemed sufficient by the Court. The indictment was quashed, all of which appears by the stenographer's notes taken at that time. Subsequently the district attorney for the United States presented a motion to rehear the matter and to vacate the judgment

of the Court quashing the indictment; upon that motion a rule to show cause was granted and to that motion the defendant subsequently filed his answer. *The question before the Court therefore is whether or not the motion to quash should be reargued.* Before referring to the reasons advanced by the district attorney as inducements for a reargument, some comment is necessary on the condition of the record. At No. 21 November term, 1915, a grand jury in this Court had investigated and passed upon the very matters charged in the indictment found by a subsequent grand jury, which indictment this Court quashed. The prior grand jury refused to find a true bill with respect to the counts, all of which and no more are embraced in the second indictment. The presentment of the first grand jury, although in general terms, was a sufficient foundation upon which an indictment embracing all the counts submitted to them might rest. Forty-seven separate counts were presented to the first grand jury. Of these, seventeen were returned in a true bill. The remaining thirty counts were submitted to a subsequent grand jury without the permission of the Court and were embodied in the bill which this Court quashed. It was nowhere made to appear that additional evidence was forthcoming before the later grand jury, or that there was any substantial reason why the second grand jury should be called upon to reconsider the acts of the former. With few exceptions, the counts in the second indictment relate to the same business transactions as appear in the first and involve the same sums of money. The first grand jury were content to charge false certification of checks, false entries in the books of the bank, and false swearing in affidavits to reports to the Comptroller of the Currency, and they were not satisfied to charge misapplication, abstraction, and embezzlement of the moneys of the bank. The second grand jury, however, did charge the defendant with misapplication, abstraction, and embezzlement of the funds of the bank. *The fact of the refusal of the first grand jury to indict the defendant for the specific offenses and in the form set forth in the second indictment was admitted by the United States attorney at the time of the argument of the motion to quash the second in-*

dictment. Notwithstanding the investigation of the first grand jury, the Attorney General, on the 17th of March, 1916, addressed to a special assistant a letter, of which the following is the greater part:

" 'Under authority of the Act of Congress approved June 30, 1906, (34 Stat., 816) you are hereby specifically authorized and directed to conduct grand jury proceeding in the Western District of Pennsylvania, in the case of United States v. Josiah V. Thompson, former president of the First National Bank of Uniontown, Pennsylvania, for violation of the national banking laws.'

"That authorization was submitted to the clerk of the court and marked filed by him on March 20, 1916, but was not placed among the records of the Court nor brought to the attention of the Court until the motion to quash had been decided, when it was produced by the district attorney. On the 24th day of March, the second presentment was made by the second grand jury. When it was received the judge expressed himself orally as follows:

"This presentment presented by the grand jury is received by the Court. The Court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district and they were authorized to present a bill embracing the matters which appear in this presentment. The Court authorized them to bring in a bill in accordance with their presentment.

"This matter is again brought to this subsequent grand jury without the knowledge or the permission of the Court, and the Court is of the opinion that there should have been an application to this Court for a resubmission of this matter to a new grand jury, or that some action of the Court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done, and inasmuch as you have made this presentment, the Court will permit you to bring in a bill of indictment in accordance with the presentment, *the Court reserving,* however, *the*

legal question as to *whether or not the indictment so brought in should be and remain a true bill against the defendant.*

"On the same day, and a few minutes after, the second indictment was presented to the Court. *The substantial reason for sustaining the motion to quash* the indictment as expressed at the time of such ruling was that *the proceedings taken as they were without the knowledge, approval, or direction of the court having charge of the grand jury and their proceedings, were in violation of law and tended to impair the substantial rights of the defendant.* The Court cannot conceive that it was the intention of Congress by the passage of the Act of June 30, 1906 (34 Stat., 816) referred to in the designation by the Attorney General to permit of a second investigation by a special assistant to the Attorney General where the first investigation, without the aid of such assistant, but with the same evidence and witnesses, resulted in a failure by the first investigating grand jury to indict. It was clearly not intended by Congress that pressure should be brought from the Department of Justice and exerted upon the new grand jury to do that which a former grand jury had declined to do. As it so happens, in the very record in this case is found a subsequent designation to a special assistant to the Attorney General under date of October 19, 1917, the substantial part of which is as follows:

" 'Your appointment as a special assistant to the Attorney General is hereby extended to include the case of the United States v. Josiah V. Thompson pending in the Western District of Pennsylvania, and you are hereby authorized and directed to conduct grand jury proceedings in that district in connection with this case.'

"It is true it does not appear that any further grand jury proceedings have been instituted in pursuance of the designation last mentioned. The act under which the designations aforesaid must have been made provides:

"That the Attorney General or any officer of the Department of Justice or any attorney or counselor specially appointed by the Attorney General under any

provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, *which district attorneys now are or hereafter may be by law authorized to conduct*, whether or not he or they be residents of the district in which such proceeding is brought.

"That the court which by statute is required to direct the summoning of grand juries, and by statute also is authorized to discharge them, has full control over their proceedings is a principle of law which can not at this day be controverted. The resubmission of a case to the same or a new grand jury is often allowed by the Court, but only upon some showing that such resubmission should be made in the interest of justice. *To permit the submission of the same matter to repeated grand juries* until one is found favorable to pressure of the prosecution *would be in violation of the substantial rights of citizens.*

"Returning now to the *reason* upon which the district attorney based his motion *for a reargument* of the motion to quash, we find that it is substantially the contention that the *defendant's motion to quash came too late.* To this the Court can not assent. *The motion to quash was made before arraignment and before plea.* It is true it was not made for a considerable time after the second indictment was returned, *but no steps were taken on behalf of the Government to correct the error pointed out by the court at the time the indictment was received.* The representatives of the Government at that time should have presented a petition and laid the grounds, if any, for an order of the Court permitting the resubmission of the matters to the grand jury, but no steps were taken by the Government *in any way* to remove the doubt with respect to the validity of the second indictment.

"For the reasons thus expressed, the Court must overrule the motion for a rehearing of the motion to quash, and must overrule a demurrer filed on behalf of the United States on July 10, 1918, to the motion to

quash, and also direct judgment to be entered upon the motion to quash, the same having been suspended pending the disposition of this rule to show cause. It is well to add that the first indictment embracing seventeen counts still remains to be tried and that the object of the Government to punish the defendant for the alleged infractions of the national banking laws may be obtained in the trial of the case."

Order:

(See page 97 of Transcript of Record.)

"And now, to wit, October 19, 1918, it appearing of record in this case at the above number and term that the court did, on May 25th, 1918, make the following order, to wit:

"And now, to wit, May 25th, 1918, a rule to show cause for a rehearing having been granted on the motion to quash the indictment in the above-entitled case, and the engagements of the court making it impossible to hear and dispose of the same within thirty days from the date of the judgment entered on the motion to quash May 8, 1918, it is hereby ordered and directed by agreement of counsel that final judgment entered on said motion to quash, May 8, 1918, be suspended, vacated and set aside pending the argument, and the disposition of the rule to show cause.

"And it further appearing of record in this case that after argument and submission the court, on September 27th, 1918, filed its opinion sur motion to show cause why a rehearing should not be had on the motion to quash the indictment in the above-entitled case, and it appearing for the reasons given in said opinion that the court overruled the motion for a rehearing of the motion to quash, and, and overruled the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash, and also directed judgment to be entered upon the motion to quash, the same having been

suspended pending the disposition of the rule to show cause as shown in the above order of May 25th, 1918, it is, therefore, now at this time ordered and directed that final judgment be entered in this case as follows:

"FIRST. It is ordered and directed that the motion for a rehearing of the motion to quash the indictment in this case is hereby dismissed, and the rule to show cause heretofore granted be and the same is hereby discharged.

"SECOND. It is ordered and directed that the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash be and the same is hereby overruled and dismissed.

"THIRD. It is hereby ordered and directed that final judgment be entered in this case on the motion to quash, the judgment of May 8th, 1918, having been suspended, vacated, and set aside by the order of court of May 25th, 1918, above referred to, and the indictment is hereby quashed and it is further ordered that the United States shall have thirty days from the date of the entry of this judgment to sue out a writ of error to review the matter in the Supreme Court of the United States."

Judgment:

(See page 98 of Transcript of Record.)

"Order filed and entered directing that final judgment be entered as follows: First, that the motion for a rehearing of the motion to quash the indictment in the case is hereby dismissed, and the rule to show cause heretofore granted be and the same is hereby discharged; second, that the demurrer filed on behalf of the United States on July 10th, 1918, to the motion to quash be and the same is hereby overruled and dismissed; and third, it is hereby ordered and directed that final judgment be entered in this case on the motion to quash, the judgment of May 8th, 1918, having been suspended, vacated, and set aside by the order of court of May 25, 1918, above referred to and that said indictment be quashed,

and it is further ordered that the United States shall have thirty days from the date of the entry of this judgment to sue out a writ of error to review the matter in the Supreme Court of the United States.

"And now, Oct. 19th, 1918, pursuant to the order of court this day filed and entered, final judgment sur motion to quash is hereby entered."

We have reviewed the substance of the indictment, the grounds for defendant's motion to quash, and the reasons assigned by the trial court for sustaining the same for the purpose of demonstrating that the decision of the court is *not* within the first class of decisions specified in the Act of 1907, viz., decisions "based upon the invalidity or construction of the statute upon which the indictment is founded."

As applicable to the *facts* claimed by defendant to be established by the record and proceedings in this case, the following *legal* conclusion is submitted:

Where it does not appear that *the decision or judgment* of the court below turned upon any controverted construction of the *statute*, the Supreme Court is *without* jurisdiction under the first division or classification of the criminal appeals Act.

1.—UNITED STATES VS. CARTER 231 U. S. 492. (Error to the District Court of the United States from the Western District of North Carolina.)

Motion to dismiss decided December 15, 1913.

In this case your Honorable Court has set forth the

scope and effect of the Act of 1907, and the principles which are to govern in its application.

From the Syllabi:

"Under the Criminal Appeals Act of March 2, 1907, *this Court* has no power to revise the mere interpretation of an Indictment of the Court below, but *is confined to* ascertaining whether that Court erroneously construed the statute on which the Indictment rested.

"In this case the *writ of error* is *dismissed* as *the ruling of the Court below* that the counts which were quashed were 'BAD IN LAW' *did not reasonably involve a construction of the statute* but may well have rested on the opinion of the Court as to insufficiency of the Indictment."

MEMORANDUM OPINION BY MR. CHIEF JUSTICE WHITE, by direction of the Court:

> "At the threshold we must consider a motion to dismiss. The case is a criminal one over which we have only the jurisdiction conferred by the Criminal Appeals Act, March 2, 1907, 34 Stat. 1246, c. 2564. There were two Indictments containing, the one 54 and the other 26 counts, purporting to charge alleged offenses against the National Banking Laws as embodied in Rev. Stat., Sec. 5209. On demurrer *the Court quashed 43* of the counts because they were *'bad in law.' It is settled* that under the Criminal Appeals Act we have no authority to revise the mere interpretation of an Indictment and are confined to ascertaining whether the Court in a case under review erroneously construed the statute: United

States v. Keitel, 211 U. S. 370; United States v. Stevenson, 215 U. S. 190, 196. Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were BAD IN LAW did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment.

"It is, however, insisted on behalf of the United States that by referring to the counts which were held good and comparing them with those which were quashed, by a process of exclusion and inclusion, it will be possible to ascertain that the action of the Court was based upon a construction of the statute, and we are asked to review the case upon this theory. At best, this proposition amounts to the contention that in every case where there is doubt as to whether the Court construed the statute or interpreted the indictment such doubt should be solved by an examination of the entire record. But the right to a review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the Criminal Appeals Act *unless it clearly appears* that the *exceptional* and *not the general* rule applies. Aside from this consideration, we cannot give our approval to the suggestion made by the Government since in effect it virtually calls upon us to analyze and construe the indictment as a prerequisite basis for the exertion of the limited power to review the action of the Court in interpreting the statute. Indeed, to follow the suggestion would be to frustrate the purposes which manifestly the jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction which was plainly one of the ends for which the law was intended would be of little avail if the right to review be extended by implication so as to embrace

cases not within the purview of the statute, thereby multiplying appeals and delaying the speedy decision of such cases. Besides, we think in consequence of the ambiguity of the ruling a case like this is not within the scope of the fundamental evil intended to be guarded against by the reviewing statute, that is, to afford a direct and immediate remedy to correct an erroneous construction of a statute before final judgment and thus to prevent the harm which otherwise might result by the application of the construction to other cases, if the power to review could only be exerted after final judgment.

"To suggest that if the mere form in which a ruling is clothed be made the test of the power to review, it will result that the exertion of the authority may be rendered unavailing in every case is without foundation. It is not to be assumed that trial courts will not seek rightfully to discharge their duty. But, even if it were possible to indulge in such an assumption, to do so would disregard the power which exists as an incident to the exercise of appellate jurisdiction to compel, in a case which requires it, such action as will prevent a destruction of or render practically unavailing the reviewing power. There can be, however, no ground in this case for indulging the forebodings which we have just answered, because there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the Indictment. In saying this we are not unmindful of the fact that it is stated in the brief for the United States that when a bill of exceptions was after the trial presented to the Court for settlement, a request was made and refused for a more specific statement of the reasons which led to the quashing of the counts of the Indictment. But, obviously, the refusal to grant a request made at the time and under the circumstances stated affords no

reason for an exertion of a power to review which we do not possess. DISMISSED FOR WANT OF JURISDICTION."

2.—UNITED STATES vs. MOIST, 231 U. S. 701 (Error to the District Court of the United States for the Northern District of Illinois.) (1914.)

From the Syllabi:

"Where it *does not appear* that the *judgment* sustaining a demurrer to the Indictment turned upon any controverted construction of the statute, *this Court has not jurisdiction* to review under the Criminal Appeals Act of March 2, 1907.

"In this case *as it does not appear* upon what ground the Court below acted in sustaining the demurrer, the *writ* of error is dismissed."

MR. JUSTICE HOLMES delivered the opinion of the Court:

"This is an Indictment under Section 215 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. 1130, for placing a letter in the postoffice for delivery by the postoffice establishment for the purpose of executing a scheme to defraud. The scheme alleged was to send out puzzle pictures, advertising as a prize for the neatest correct answer a credit order for $350, on a certain piano, one for $300, for the next neatest, and others for $200 for correct answers. Persons answering were to be told that they were entitled, for instance to an order for $200 on a piano sold the world over for $300, which cost them $75 cash with the order. The credit was to be a pretense, as the piano to be delivered was to be one of a retail price not exceeding the cash received. It was not alleged that the piano was to be

worth less than the cash paid, but, as is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made, Durland v. United States, 161 U. S. 306, and false statements as to the value of the piano bought. The Indictment was demurred to and the demurrer was sustained.

"It will not be necessary to decide whether the facts alleged show a scheme to defraud, since it does not appear on what ground the Court acted. As was said in United States v. Carter, ante, pp. 492, 494: 'there is nothing in the record showing any request made to the trial Court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the Indictment.' As it does not appear that the judgment turned upon any controverted construction of the statute, the writ of error must be dismissed in this case as in that. It is unnecessary to consider whether every determination concerning the common law of fraud taken for granted by the Act would be a decision based upon the construction of the statute, within the meaning of the Act of March 2, 1907, c. 2564, 34 Stat. 1246. WRIT OF ERROR DISMISSED."

"The United States can have a writ of error when an Indictment is quashed, or set aside, or a demurrer sustained, *when* such action is predicated on the construction or constitutionality of the statute, and * * * On such writ of error the Supreme Court will consider the decision below *only* so far as it is based on the invalidity or construction of the statute."

Byrne's Fed. Crim. Procedure, 222-223, citing 1.—UNITED STATES v. STEVENSON, 215 U. S., 190; 54 Law Ed. U. S. Sup. Ct. Rpts., p. 153.

In this case the Federal District Court sustained a demurrer to an Indictment upon *two* grounds, *one* of which involved the construction of the Federal statute on which the Indictment was found and *the other* the sufficiency of such Indictment *upon general principles of criminal law.*

Held: (a) That the case was reviewable in the Federal Supreme Court on writ of error under Act of March 2, 1907, authorizing such writs of error to review a judgment sustaining a demurrer to an Indictment when such judgment is "based upon the invalidity or construction of the statute upon which the Indictment is founded."

(b) The sufficiency of the Indictment *upon general principles of criminal law is not open for review* in the Federal Supreme Court on the writ of error to a Federal District Court authorized on behalf of the Government by said Act of March 2, 1907.

MR. JUSTICE DAY delivered the opinion of the Court wherein it was stated, inter alia, as follows:

> "This statute (Act of March 2, 1907) was before the Court in the case of United States v. Keitel, 211 U. S. 370. * * * In that case it was held that *the purpose of the statute* being to permit a review in this Court of decisions based upon the invalidity or construction of the criminal statutes of the United States, the decisions of the lower Courts were intended to be reviewed *only* upon such questions, *and the whole case could not be brought for review.*
>
> In the Keitel case it was insisted that this Court should consider the validity of the Indictment upon questions of *general law* not dediced in the Court below. We are here confronted with a case in which a decision of the Court below sustaining a demurrer

to an Indictment involves *not only* the construction of a Federal Statute, *but another ground* upon which the decision was also rested, which *involves the sufficiency of the Indictment on general principles.*

"THE OBJECT *of the criminal appeals statute* was to permit the United States to have a review of questions of statutory construction in cases where Indictments had been quashed, or *set aside*, or *demurrers* thereto *sustained*, with a view to prosecuting offenses under such Acts when this Court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the Government, *in order to have* a final and determinative construction of the Act and to prevent a miscarriage of justice if the construction of the statute in the Court below was unwarranted.

"In the Keitel case this Court said (211 U. S. 398):

" 'That Act (Act of March 2, 1907) we think plainly shows that, in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides, it contemplates vesting this Court with jurisdiction *only* to review the particular question decided by the Court below *for which the statute provides.*'

"AS THE QUESTION OF GENERAL LAW involved in the decision of the Court below is not within either of the classes named in the statute giving a right of review in this Court, we must decline to consider it upon this writ of error."

2.—UNITED STATES vs. MASON, 213 U. S., p. 115, (Error to the District Court of the United States for the District of Colorado) (1909.)

This was a criminal prosecution under Sections 5508 and 5509 of the Revised Statutes charging conspiracy.

MR. JUSTICE HARRLAN delivered the opinion of the Court:

> " * * * It was stipulated by the parties that the defendants might file a demurrer to the Indictment and to each count thereof, as well as, 'a plea in bar in the nature of a plea of former acquittal,' to so much of each count as charged them with the crime of having killed and murdered one Walker, named in the Indictment * * *.
>
> "The Defendants filed a joint and separate demurrer assailing the sufficiency of each count of the Indictment * * *.
>
> "The Defendants filed special pleas in bar of so much of each count of the Indictment as charged that the Defendants, in the act of violating Section 5508, killed and murdered Walker for the purpose of giving effect to the alleged conspiracy. To each special plea the Government filed a demurrer.
>
> " * * * The Court below overruled the demurrer to the Indictment and adjudged each plea in bar to be sufficient. The Government electing to stand by its demurrer to the special pleas, the Circuit Court of the United States by an order to that effect, discharged the Defendants from that part of each count in the Indictment which related to the charge of their having murdered Walker * * *.
>
> "The United States thereupon prosecuted the present writ of error under the Act of March 2, 1907 * * *.
>
> "Only that part of the above Act of March 2, 1907, is applicable to the present case which authorizes a writ of error by the United States 'from the decision or judgment sustaining a special plea in bar, when the Defendant has not been put in jeopardy.' *In reviewing that decision may we go beyond the ruling in the Court below on the special pleas in bar and consider the various grounds of demurrer* to the Indictment? That question is answered in the much considered case of the United States v.

Keitel, decided at the present term, 211 U. S. 370, 398. It was there said: 'That Act, we think, plainly shows that in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides, contemplates vesting this Court with jurisdiction *only* to review the particular question decided by the Court below for which the statute provides. In other words, that *the purpose* of the statute was to give the United States the right to seek a review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute, *and not to open here the whole case.* We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reexamine the particular decisions which the statute embraces, *but also* because of the whole contest, which clearly indicates that *the purpose* was to confine the right given to a review of the decisions enumerated in the statute, *leaving all other questions to be controlled by the general mode of procedure governing the same* * * * .' "

Point IV.

(A.)—The decision or judgment complained of is not embraced within the remaining provision of the Act of March 2, 1907, to wit, a "decision or judgment *sustaining a special plea in bar* when the defendant has not been put in jeopardy."

It is admitted that the defendant had not been put

in jeopardy at the time his motion to quash was made or when the judgment sustaining this motion was entered. Therefore it becomes important to determine what is the meaning of the words "*a special plea in bar*," as used in the Act of 1907, and their relation to defendant's motion to quash.

Of course, if defendant's motion to quash had amounted in legal significance and effect to a "special plea in bar" of the prosecution, such, for instance, as setting up the statute of limitations, or a former acquittal or conviction, as a bar to any prosecution for the offences charged against the defendant, then, no matter what designation may have been given to the motion, the judgment rendered upon it would have been appealable.

"*The essential nature of a plea in bar*, such as a plea of the statute of limitations, *is not changed by* designating it a plea in abatement, and such designation does not defeat an appeal by the United States under this Act." (The Act of March 2, 1907.)

> Byrne's Fed. Crim. Procedure 223, citing UNITED STATES vs. BARBER 219 U. S. 72. (Error to the District Court of the United States for the District of Idaho.) (1911.)

From the Syllabi:

"On an appeal under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, *this Court can only look to the judgment* which was actually entered to determine what the action of the Court below was, *and not to any stipulation* between the parties.

The *designation* of a plea *does not change* its essential

nature, and the fact that the statute of limitation is designated as a plea in abatement and not a plea in bar, is untenable.

"Even if this Court has not jurisdiction under the Act of March 2, 1907, of an appeal by the United States from a judgment sustaining a plea in abatement, it has jurisdiction if the plea sustained was in fact one in bar and based solely on the statute of limitations."

But if defendant's motion to quash is *not* one and the same as "a special plea in bar," *and does not* have one and the same legal significance and effect, *then*, the judgment complained of *is not* in any way a judgment "sustaining a special plea in bar," *is without* the provisions of the Act of 1907, the Supreme Court *does not* have jurisdiction to entertain the writ and defendant's motion to dismiss should be allowed.

We think UNITED STATES vs. BARBER, (Supra.) clearly justifies this latter position.

(B) Pleas—General Divisions:

All authorities agree that pleas are divided into two general classes, viz:

1.—DILATORY.

2.—PEREMPTORY.

Dilatory Pleas—Peremtory Pleas—Defined.

"DILATORY PLEAS are such as *delay* the Plaintiffs remedy, by questioning, *not the cause of action* but the

propriety of the suit, or the mode in which the remedy is sought."

Bouvier's Law Dic. 9th Ed., Vol. 2, p. 342, (1860.)

"PEREMTORY PLEAS are in bar of the *Action*."

Ibid, 340—citing Steph. Pl. 63; 1 Chit. Pl 425; Lawes Pl. 36.

Pleas in Abatement—Pleas in Bar—Classified—Defined—and Distinguished.

"*A plea in abatement* belongs to the *dilatory class*. * * *

"A plea in abatement is when, for any default, the defendant prays that the *writ or plaint do abate*, that is, cease against him for that time.

"*A plea in bar* is of the *peremtory kind*, * * * one that denies that the plaintiff has *any cause of action*.

"*A Plea in Bar* is, therefore, *distinguished* from *all* pleas of the *dilatory* class, as impunging *the right of action altogether, instead* of merely tending to divert the proceedings, *or suspend them or abate the particular writ. It is in short a substantial and conclusive answer to the action*."

Bouvier's Law Dic. 9th Ed., Vol. 2, p. 340-1, citing Steph. Pl. 70, 71.

"*A plea in abatement* is a plea which goes to *abate* the plaintiff's *action:* that is, to suspend or *put it off for the present*.

"A plea in bar is a plea which goes to bar the plaintiff's *action;* that is, *to defeat it absolutely*."

Blacks Law Dic. 2nd Ed., 903,—citing 3 Bl. Comm. 301-303.

"*A plea in bar* goes to the *merits* of an action, *to defeat it*, while *a plea in abatement*, as the term implies, *seeks merely to defeat the proceedings for the* present time."

Standard Ency. of Proc. Vol. 1, p. 28.

Pleas In Abatement and SPECIAL Pleas in Bar Distinguished.

"*A plea in abatement* is principally for a misnomer, a wrong name, or a false addition to the prisoner * * * But in the end there is little advantage accruing to the prisoner by means of these dilatory pleas, *because*, if the exception be allowed, a new bill of indictment may be framed * * *."

SPECIAL PLEAS IN BAR are those "which go to the *merits* of the indictment, and give a reason why the prisoner *ought not to answer it at all* nor put himself upon his trial for the crime alleged.

"These are of four kinds: A former acquittal, a former conviction, a former attainder, or a pardon."

4 Bl. Comm. 334.

(C) Defendant's Motion to Quash is Not a Special Plea in Bar:

Measured by the foregoing authorities, defendant's motion to quash is *not* "a special plea in bar" in that, its legal effect, if allowed, *would not avoid the action*, or

right of action, but would *only* serve to *abate* the *particular indictment* against which it was offered, with the right, remaining unimpeached to prefer another indictment in a proper manner upon the same cause of action, while, "a special plea in bar," if allowed, would destroy or bar *not only* the particular indictment, *but* as *well* the action upon which it is based, *leaving no right* to prefer another indictment.

The Motion to Quash and Reason of the Court for Sustaining Same:

The defendant's motion to quash the indictment was, strictly speaking, neither a "plea in bar," nor a plea in abatement.

It did not relate to irregularities in selecting and empaneling the grand jury, objections to which irregularities may be raised either by a challenge to the array, a motion to quash, or a plea in abatement (Agnew vs. U. S., 165 U. S. 36; U. S. vs. Gale, 109 U. S. 65;) nor did it relate to any matter of form.

The defendant's objections to the indictment were matters of substance and were based upon the proposition that the representatives of the government by resubmitting to the Erie grand jury, without the knowledge, permission or direction of the Court, charges which had been ignored by the Pittsburgh grand jury, proceeded in a manner which deprived the defendant of his legal and constitutional rights, thereby vitiating the *particular* indictment which the defendant moved to quash.

The representatives of the government by the manner in which they proceeded in this case seemed to think that the Court has no control over proceedings before a grand jury or over the exercise of the functions of the representatives of the government in instituting criminal prosecutions. It would seem that they were under the impression that whenever, in their opinion, a citizen should be indicted, they are at liberty, without arrest and preliminary hearing, to call witnesses against him before a grand jury, and if that grand jury does not agree with them and ignores their charges, they may then resubmit the same charges to a subsequent grand jury, and keep on resubmitting their charges until they succeed in finding a grand jury that will agree with them.

Defendant's motion to quash was not a plea of misnomer, or a plea setting up irregularities in the summoning, empaneling or constitution of the grand jury, which are matters usually pleadable in abatement, nor a plea to the jurisdiction of the Court, (U. S. vs. Celestine, 215 U. S. 278), nor a plea setting up the statute of limitations (U. S. vs. Barber, 219 U. S. 71,) nor any other plea in bar of the prosecution.

As a matter of fact it was not a plea at all, but a motion to quash the indictment because of the illegal and unconstitutional methods pursued by the representatives of the government in procuring the indictment.

The several pleas in criminal cases are named and classified as follows in 12 CYC, page 348:

> "The pleas which may be made upon arraignment are thus classified: Pleas to the jurisdiction,

by which the accused denies the authority of the Court to try him; declinatory pleas, which are now obsolete, but which anciently consisted of the plea of sanctuary and the plea of clergy; pleas in abatement of the indictment, which may be either for defects in the indictment which are apparent of record, or for defects which are not apparent of record, as for example, the plea of misnomer; special pleas in bar, by which defendant shows extrinsic facts by reason of which the indictment is not maintainable; and the plea of the general issue by which he claims that he is not guilty. The defendant may also plead guilty or interpose the plea of nolo contendere, which is an implied confession. And he may demur to the accusation as insufficient in law, or move to quash the same, or to dismiss the prosecution. *Strictly speaking*, however, the *latter are not pleas.*"

The allegations of fact set forth in the motion were admitted to be true. The Court Quashed the indictment—giving as a reason therefor, "that the proceedings, taken as they were, without the knowledge, approval, or direction of the Court having charge of the grand jury and their proceedings, *were in violation of law and tended to impair the substantial rights of the defendant*"

Certainly the motion to quash struck only at the particular indictment—*Certainly* the ruling and judgment of the Court struck down *only* the particular indictment,—leaving the cause of action, so far as the motion and judgment thereon was concerned, in full life.

In the light of the foregoing authorities how can it be contended that the motion to quash was in effect a special plea in bar?

That an indictment may be quashed for matters not apparent upon the face of the record is clear (Bishop's Criminal Law, 763; Commonwealth v. Bradney, 126 Pa. 199).

As a general proposition it may be stated that a motion to quash an indictment is a proceeding addressed to the discretion of the court, a discretion regulated by judicial rule, and ordinarily the action of the court in quashing the indictment is not open to revision in the higher courts.

There are exceptions to this rule, but in the federal courts the exceptions are specified and defined in the Act of Congress of March 2, 1907, c. 2564, and the burden is clearly upon the government to bring itself within the exceptions by showing that the decision quashing the indictment was either a decision based upon the invalidity or construction of the statute upon which the indictment is founded, as in the case of U. S. v. Corbett, 215 U. S. 233, or a decision sustaining a plea in bar, as in the cases of U. S. v. Barber, 219, U. S., 71, and U. S. v. Celestine, 215 U. S., 278.

The Effect of Defendants Motion in Quashing the Present Indictment Upon Other or Future Indictments:

Counsel for the Government seem to make much of the fact that the statute of limitations has run, and, therefore endeavor to treat defendant's motion and the

order of court quashing the *present* indictment as a motion and order quashing as well *all other or future* indictments. The fallacy of this is evident: Were another indictment obtained in a recognized, orderly and legal way, the effect of the present motion, if filed against it, would be nil. That a *special plea in bar*, setting up the running of the statute of limitations, *might be* pleaded against it and *might be* allowed is another question—one that does not concern the matter presently before the Court.

To ILLUSTRATE: Suppose the present indictment had been found but a day before the running of the statute, and called for trial the *next* day *when the statute had run*, could it be urged that a meritorious motion should not be allowed, *because* a plea in bar of *another* and future indictment *might* be subsequently interposed?

To argue that defendant's right to file his motion was lost by not presenting it at an earlier date does not meet the issue—certainly not under all the circumstances of this case: On the very day that the indictment was returned a true bill, and before the order was made permitting the return thereof, the Court, upon receiving the presentment of the grand jury, expressed "*grave doubts as to whether an indictment founded thereon is valid*," and while allowing the return of the bill, reserved "*the legal question as to whether or not the indictment so brought in should be and remain a true bill against the defendant.*"

Thereafter the United States Attorney had almost two years in which to correct the plainly indicated defects in this indictment. Yet nothing was done and

when, more than two years afterwards, defendant moved to quash, it was argued that he was estopped because he had not moved more promptly. *Whatever else* counsel for the Government may have considered defendent's motion in the arguments thereon *in the court below*, they *did not* therein deem it *a special plea in bar* and argue that defendant was estopped because he had not presented it until he was about to be arraigned. *Certainly* pleas in bar, either general or special, or motions to quash, *based upon matters of substance*, are always in time if presented before arraignment.

To urge in the court below that it was incumbent upon the defendant to present his motion to quash promptly upon the finding of the indictment and that, failing so to do, he was thereby estopped from presenting it upon being called for arraignment regardless of any merit that the motion otherwise possessed, was to argue in that court that defendant's motion *was a dilitory plea*,—a plea in abatement, based upon some mere *matter of form*, and *not of substance*, such a plea as only tended to *delay* and not to *destroy* the action.

To now urge in the Supreme Court that defendant's motion was a special plea in bar,—one that not only strikes down the *present* indictment, *but as well* destroys *the action itself and bars all other and future* indictments, *is to abandon and reject* the position taken in the trial court.

It appears to counsel for defendant that the Government should be held to the position taken in the court below.

We think this view is supported by the case of

UNITED STATES vs. GEORGE, 228 U. S. 14, (1913). (Error to the District Court of the United States for the District of Nebraska.)

From the Syllabi:

"QUAERE: Whether the Criminal Appeals Act of March 2, 1907, does not require an explicit declaration of the law upon which the Indictment is based and a ruling on its validity and construction; and *whether* on an *appeal* taken *under that Act*, the Government *can seek to sustain* the *Indictment* as valid under *other* statutes than *those relied upon in the trial court.*"

The facts in this case involved the construction of Section 5392, Revised Statutes, and the validity of an Indictment thereunder for purjury committed in making proof and final entry of a homestead claim of certain described lands.

MR. JUSTICE MCKENNA delivered the opinion of the Court:

> "It will be observed that the indictment charges that the oath was taken in a proceeding wherein a law of the United States authorized an oath to be administered. Whether it was is the question in the case; and we are brought to the inquiry as to what law of the United States authorized the oath. To this inquiry the record discloses divergent answers on the part of the Government. In the District Court it was the view and contention of the Government that the indictment was founded on Sec. 5392 of the Revised Statutes and Sec. 2291, as amended by the Act of March 3, 1877, c. 122, 19 Stat. 403.

The record not disclosing this, and that it might appear, a bill of exceptions was tended to and authenticated by the district judge.

"The bill of exceptions recites that the Court in sustaining the demurrer based its decision upon those sections as the law upon which the Indictment was founded 'and held that there is no law of the United States which required the defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the Indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto.' And so far as the assignment of errors is specific it states Sec. 2291 as the applicable law and assails its construction.

"This view of the applicable law of the Indictment is now abandoned. Indeed, it is distinctly rejected. The Government in its brief here says: 'The present Indictment was *not* based on Sec. 2291, for it seems probable that the 'two credible witnesses' there provided for mean two persons *other* than the claimant himself. Therefore, we must seek elsewhere for the authority in law for the claimant to make the oath as to his residence on, and cultivation of, the land he seeks to homestead.' And, going elsewhere, the Government finds the law, as it contends, in certain regulations made by the Interior Department.

"There is ground for a contention that *if this* Court *should be put to a choice* between these views of the applicable law of the Indictment *we should have to select that urged and passed upon by the trial court*, and a query might then occur—has this Court jurisdiction under the Criminal Appeal Act? That act allows a direct appeal to this Court 'from a decision or judgment * * * sustaining a demurrer to any Indictment * * * where such decision or judgment is based upon the invalidity or construc-

tion of the statute upon which the Indictment is founded.

"Act of March 2, 1907, c. 2564, 34 Stat. 1246.

"This statute seems to require an explicit declaration of the law upon which an Indictment is based and ruling on its validity or construction. *To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals.*"

WHEREFORE it is respectfully submitted that the judgment appealed from is *neither* a decision or judgment "based upon the invality or construction of the statute upon which the indictment is founded," *nor* a decision or judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy," and, consequently, is not the subject of review under the provisions of the Act of March 2, 1907, and, therefore, defendant's motion to dismiss should be allowed, and the Writ of Error accordingly dismissed.

J. E. B. CUNNINGHAM,
R. M. GIBSON,
W. C. MCKEAN,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *v.* JOSIAH V. THOMPSON, DEFENDANT IN ERROR.	No. 250.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

ON MOTION TO DISMISS WRIT OF ERROR FOR LACK OF JURISDICTION.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION TO SAID MOTION.

(a) It is admitted that unless the judgment of the District Court quashing the indictment (Rec. 98) is a

> "* * * judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy,"

the United States has no right to a writ of error under the provisions of the Act of March 2, 1907, c. 2564, 34 Stat. 1246.

(b) It is settled by the decision of this Court in *United States* v. *Barber*, 219 U. S. 72, 78, that

the name given to a pleading does not determine its true character under the Act of March 2, 1907. That is to say, if the motion to quash the indictment filed May 7, 1918 (Rec. 77), was in substance a plea in bar, if it had all the essential characteristics and effects of such a plea, the mere nomination of it as a motion to quash would not prevent this Court from treating it as a plea in bar, nor the judgment upon it as a judgment sustaining such a plea. This, we assume, will be admitted.

(c) In *United States* v. *Oppenheimer*, 242 U. S. 85, where this Court treated a motion to quash as a plea in bar, it is said at page 87:

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another."

We adopt this clear and precise definition, and the only question is whether the judgment of the District Court in the case at bar is one quashing a bad indictment or whether it is one based upon the ground that prosecution against Thompson is barred as matter of substantive law.

(d) The ground of the motion, in so far as it was sustained by the Court, and the ground of the judgment quashing the indictment was solely this, viz.: The very matter and substance of the indictment

had been presented to a grand jury at a prior term of Court; that grand jury had ignored the charges and had explicitly refused to vote a true bill based upon them; they were nevertheless submitted to the subsequent grand jury of the March, 1916, Term without first submitting them to the Court and obtaining its approval; and the presentment based upon them and the bill of indictment based upon the presentment had never received such approval.

Is such a judgment one holding that the particular indictment in question was bad, or is it one holding that the prosecution is barred as a matter of substantive law?

The question arises on a motion to dismiss where argument at length is not permitted nor desirable. We claim that if the case is set down for hearing we can show this Court that the action of the District Court was without warrant of law and in excess of its jurisdiction in this respect, viz., that a District Court of the United States has no power to strike an indictment from the files, or to refuse to allow it to be presented or filed, because the proceeding of the grand jury which presented it, either in the matter of its original investigation, or in the matter of its formal presentment, had not received its approval or consent.

Upon a motion of this sort a serious question of law of this character will not be finally determined.

Assuming, therefore, that the action of the Court in quashing the indictment solely for the reason that it had not been submitted by it or to it before it was

presented or filed was without warrant of law and in excess of any jurisdiction conferred by law on the District Courts of the United States, was it, therefore, a judgment in bar of the indictment as matter of substantive law? It is entirely clear that the judgment of the Court was not based on anything "bad" in the indictment itself, e. g., that it did not specifically state the offense. The objection, therefore, was not one directed to this particular indictment but to any indictment against Thompson for these particular offenses, and it was based upon a condition which was claimed to be a condition precedent to any indictments against him but which, according to the assumption this Court must make upon this motion, was illegal. If, therefore, a defendant plead that any indictment against him is void unless certain illegal conditions are complied with, and the Court sustain the plea, has it not sustained a special plea in bar of any prosecution against said defendant as a matter of substantive law? The "substantive law" in question in this, viz., whether a District Court of the United States has a right to refuse to allow an indictment to be filed, or to strike it from the files when filed, because it is based upon the same matters which a previous grand jury has ignored, and has not received the approval or consent of the Court before resubmission to the second grand jury.

A decision that a District Court has this right is a decision that any indictment against any defendant is barred unless it complies with this alleged rule of substantive law, which rule, we allege, does not exist.

Does not such a decision constitute a complete bar to the prosecution of the defendant?

The classical instances of pleas in bar are: *autrefois* acquit, *autrefois* convict, and pardon. These are all matters outside of the record, pleaded by the defendant as a bar to any further prosecution against him. Do they differ in any substantial sense from the motion to quash in the case at bar which sets up, as a matter outside of the record, that the indictment did not receive the approval of the District Court, and that therefore it is not a valid indictment?

In this case the judge had received this indictment and ordered it filed, reserving the right to reject it on the ground that it had been submitted to the grand jury without the permission of the Court. The case had been thrice continued for reasons affecting its trial on the merits to a time when a new indictment would have been barred by the Statute of Limitations. No action by the Court or motion by defendant had been meanwhile taken. A paper entitled a motion to quash, setting up matter of fact not appearing of record but proven by affidavit, was then first presented.

If the Court considered the indictment one which it would have permitted if a permission to bring in was necessary, there was no reason to revoke its order allowing it to be received and filed. If necessary, an order *nunc pro tunc*, authorizing its presentation to the grand jury, could have been made.

The ruling, therefore, was in effect that the Court dismissed this indictment on defendant's plea be-

cause the District Court would not allow an indictment covering these charges once ignored by one grand jury to be again submitted to another. This operated as a bar not only to this but to any other indictment embracing these charges.

It is, of course, argued that the matter is not one of substantive law, because of this reason, viz.: The United States Attorney should have noted the remarks of the District Judge when the second indictment was presented to him to the effect that he had doubts of the authority of the grand jury to present a resubmitted indictment without his approval, and should consequently have asked the Court for its approval before submitting the indictment to the second grand jury. The point is, therefore, one merely of procedure or discretion, and not one involving a bar to the indictment on a question of substantive law. This, however, is merely arguing in a circle, and brings the question back to the point from which it started, namely; did the District Court in deciding that a resubmitted indictment must have its approval decide a question of substantive law, and is such a decision, assuming that it is without warrant of law, one sustaining a special plea in bar? If the requirement as to an indictment insisted upon by the District Court, viz., that its approval should be had before a resubmission of the indictment is valid, is absolutely illegal, as we claim it is, and as must be assumed on this motion, this Court will not insist that the United States

Attorney should have submitted to a requirement contrary to law.

In order to save its rights, and that this Court may have the whole controversy fairly presented to it, the United States has this day filed a motion for leave to file a petition for writs of mandamus and prohibition to the District Court, setting up therein the same matters which are relied upon in this brief, viz., that the order of the District Court was without any warrant of law, and in excess of its lawful jurisdiction.

It is respectfully suggested that, if this Court should see fit to grant leave to file the said petition and should issue its alternative writs of mandamus and prohibition, the whole case upon its merits be set for argument at one time to be fixed by this Court.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF America, plaintiff in error, *v.* JOSIAH V. THOMPSON. | No. 250. No. ——, Original.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

EX PARTE THE UNITED STATES OF AMERICA, PETITIONER.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF FACTS.

During the November term, 1915, of the District Court for the Western District of Pennsylvania, a grand jury of the United States, duly empaneled and in session, presented that one Josiah V. Thompson had within said western district wilfully misapplied certain of the moneys, etc., of the First National Bank of Uniontown, Pennsylvania,

had wilfully made false entries on the books of said bank, and had sworn falsely in connection with certain reports to the Comptroller of the Currency, these violations of law having come to the knowledge of the grand jury through the testimony of witnesses before them. The grand jury, having presented the matter to the court, requested that the court instruct the district attorney to lay before the grand jury bills of indictment more particularly and at length setting forth said violations of law. (Rec. 5.)

Thereupon the following order was entered by the court:

> And now, to wit, February 4, 1916, the foregoing presented in open court, and ordered to be filed; and it is further ordered that the United States attorney prepare and present an indictment to the grand jury, as recommended. (Rec. 5.)

The United States attorney had presented to said grand jury a bill of indictment against said Thompson containing forty-seven counts, thirty of which counts charged the following offenses, viz, wilful misapplication, abstraction, and embezzlement of the funds of the said First National Bank of Uniontown, Pennsylvania; but the said grand jury ignored the said thirty counts charging as aforesaid and refused to return the same as a true bill, whereupon the United States attorney withdrew from the consideration of said grand jury the said thirty counts and sub-

mitted to them only the first seventeen counts of said proposed bill of indictment. (Rec. 87, 94.)

Thereupon, on February 8, 1916, and in the November, 1915, term of said court (Rec. 30), said indictment containing seventeen counts was filed against Thompson in accordance with the said presentment and order of court (Rec. 8–30). Counts one to eight, inclusive (Rec. 8–16), charged that Thompson, being president of the First National Bank of Uniontown, Pennsylvania, wilfully certified certain checks when the drawer thereof did not have funds on deposit at the time equal to the amount of the check, an act prohibited and punished by section 5208, R. S., and section 13 of the act of July 12, 1882, c. 290, 22 Stat. 166. The checks particularized in the several counts were all checks of William S. Craft, treasurer of Fayette County, Pennsylvania. Counts nine to eleven, inclusive, charged Thompson with making false entries on the books of the bank in respect to its assets, in violation of section 5209, R. S. Counts twelve to fifteen charged him with making false entries in the reports of the bank to the Comptroller of the Currency, counts twelve and thirteen as to the items already dealt with of the assets on the books of the bank, and counts fourteen and fifteen as to the borrowing of bonds. Counts sixteen and seventeen charged him with perjury in connection with his oath to these same reports to the Comptroller.

While the presentment of the grand jury aforesaid of the November term, 1915, of said court included among the matters which had been called to its attention and upon which it desired a formal bill of indictment the following, viz., that Thompson did wilfully misapply certain of the moneys, etc., of the First National Bank of Uniontown, Pennsylvania (Rec. 5), the bill as formally presented and filed contained no charge upon this subject.

On March 24, 1916, during the March term of the said District Court for the Western District of Pennsylvania, a grand jury of the United States, duly empaneled and in session, presented to said court that the said Josiah V. Thompson had wilfully misapplied and abstracted certain of the moneys, etc., of the First National Bank of Uniontown, Pennsylvania, that their knowledge of the matter had come to them through witnesses sworn before them, and that they therefore requested the court to instruct the United States attorney to lay before them a bill of indictment, more paricularly and at length setting forth said violations of law (Rec. 31). Whereupon the said court caused the following order to be made:

> And now, to wit, March 24, 1916, the foregoing presented in open court, and ordered to be filed; and it is further ordered that the United States attorney prepare and present an indictment or indictments to the grand jury as recommended. (Rec. 31.)

At the time the above order was made by the District Court, the court informed the grand jury that it had grave doubt as to whether the indictment was valid in view of the fact that the matters charged therein had been considered by a prior grand jury which had refused to vote a true bill in regard to them and that no action of the court had been taken in regard to the presentment made by the grand jury of the March, 1916, term, nor had the consent and approval of the court ever been obtained thereto; but that, as the grand jury had completed its work, he would permit the indictment to be brought in but would reserve the question whether it should be and remain a true bill against the defendant. (Rec. 95.)

Thereupon, and in accordance with this presentment and order of court, on March 24, 1916, and in the March, 1916, term of court, an indictment was filed against said Thompson (Rec. 32–77). It contained thirty counts. Counts one to twenty, inclusive, charged that Thompson, being president of the First National Bank of Uniontown, Pennsylvania, did wilfully misapply certain of the moneys, etc., of said bank. (Rec. 32-66.) These counts all dealt with certain checks which, it was charged, Thompson unlawfully caused to be paid by the bank. Counts one to twelve, inclusive (Rec. 32–52) dealt with checks drawn by William S. Craft, treasurer of Fayette County, Pennsylvania. None of these checks, however, except that referred

to in the second count (Rec. 34), was the same as the checks of the same drawer dealt with in the indictment of the November, 1915, term of said court. Counts thirteen to nineteen, inclusive (Rec. 53–66), dealt with certain checks of said Thompson, none of which had been referred to in the indictment of the November, 1915, term of said court. Count twenty (Rec. 66) dealt with the crediting to said Thompson's account of certain checks drawn to the order of said William S. Craft, treasurer, none of which had been referred to in the indictment of the November, 1915, term of said court.

Counts twenty-one to twenty-nine (Rec. 68–75) charged that Thompson, being president of the First National Bank of Uniontown, Pennsylvania, did wilfully abstract and convert to his own use certain moneys, etc., of the said bank, a particular description of which was unknown to the grand jury.

Count thirty charged that Thompson, being president of the First National Bank of Uniontown, Pennsylvania, did wilfully embezzle certain bank notes belonging to said bank.

Thereafter the trial of said indictment of the March, 1916, term of said court was set during, to wit, the week beginning January 8, 1917, whereupon, on December 29, 1916, Thompson filed a petition for a continuance because of the numerous charges contained in the indictment, and the serious nature thereof and in order to give him time

to prepare his defense thereto. On December 30, 1916, a continuance was granted in accordance with this prayer.

On April 14, 1917, Thompson petitioned the court for a further continuance, assigning the same grounds as in his previous petition.

The trial of the indictment having been continued to the November, 1917, term of said court, on October 8, 1917, Thompson petitioned the court for a further continuance to the May, 1918, term of court for the same reasons given in his former petitions and so that additional time might be given him in which to prepare his defense to said indictment. Certified copies of these petitions are attached to the petition for mandamus.

On May 7, 1918 (Rec. 77), Thompson filed a motion to quash said indictment of the March, 1916, term of said court for the reason, among others, that the matters charged therein had been submitted to the grand jury of the November, 1915, term of said court, but that said grand jury had ignored said charges and had refused to return a true bill as to them; that these same matters had been submitted to the grand jury for the March, 1916, term of said court without the prior consent or approval of the said District Court for the Western District of Pennsylvania.

On May 8, 1918 (Rec. 79), the court granted the motion for the reason aforesaid, and ordered the indictment to be quashed.

On May 17, 1918 (Rec. 82), the United States filed a motion for a rehearing and to vacate the order quashing the indictment, alleging that at the time the defendant's motion to quash was filed the statute of limitations had run as to the offenses charged in the indictment of the March, 1916, term of said court, and that said indictment had been prepared and filed in accordance with the presentment of the grand jury and the order of the court. An answer was filed to this motion (Rec. 86), and the United States also filed a demurrer to the motion to quash (Rec. 93). A rule having been granted to show cause why a rehearing should not be had (Rec. 92), the court on October 19, 1918 (Rec. 97, 98), refused the motion for a rehearing, overruled the demurrer and entered final judgment quashing the indictment of the March, 1916, term of court, for the sole reason that the matters charged therein had been called to the attention of the grand jury for the November, 1915, term of court, which had refused to return a true bill in regard to them, and that their resubmission to a grand jury of the March, 1916, term of court was without the knowledge, consent, or approval of the District Court. An opinion was filed (Rec. 94–97) setting forth the reasons of the court at length, to which reference is made.

On October 26, 1918 (Rec. 99, 100), the United States treating said styled motion to quash as a special plea in bar to said indictment, sued out a

writ of error to said judgment under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and said writ was docketed as number 755 of the October, 1918, term, number 250 on the October, 1919, term of this court.

On October 6, 1919, Thompson, defendant in error in said cause, moved to dismiss said writ for lack of jurisdiction in this court in that the judgment quashing the indictment was not an order or decision as to which the statute of March 2, 1907, gives the United States a right to a writ of error.

On October 6, 1919, the United States presented a motion for leave to file a petition for writs of mandamus and prohibition to the District Court for the Western District of Pennsylvania, directing it to restore the indictment to the files of the court, and prohibiting it from striking the indictment from said files, because it had not received the approval of the court.

The consideration of all of said motions was by the court postponed until the hearing on their merits.

The case is now before this court on the writ of error of the United States and on said several motions.

QUESTIONS INVOLVED.

The questions involved are:

(1) Whether the ruling of the District Court as to the necessity of its approval to the indictment was erroneous or not;

(2) If it was erroneous, was the judgment based thereon one "sustaining a special plea in bar";

(3) If it was not, is the error one which can be corrected by writ of mandamus.

ARGUMENT.

A. THE RIGHT OF THE UNITED STATES.

A district court of the United States has no power to refuse to allow an indictment to be presented and filed for the sole reason that the subject matter thereof has been presented to a previous grand jury and ignored by them and the resubmission of the matter to a subsequent grand jury has not received the approval of said court.

The Common Law.

(*a*) In so far as our present knowledge goes, the grand jury, as an accusing or presenting body, has its origin in the Assize of Clarendon, published by Henry II in 1164, extended by the Assize of Northampton, published in 1776.[1] The assizes provided that if anyone was accused before the justices on their eyre of murder, etc., by the oaths of certain qualified persons selected from the county, the hundred, and the vill, he should go to the ordeal and subsequently adjure

[1] Stubbs Sel. Charters, 141–143, 150; Pollock & Maitland, Hist. of Eng. Law, Vol. I, p. 131; Vol. II, p. 639; Houldsworth Hist. of Eng. Law, Vol. I, pp. 147, 148; Stephen, Hist. Crim. Law, Vol. I, pp. 251–253; Maitland, Const. Hist. of Eng., pp. 127, 128.

the realm. The justices were instructed by the King to travel through the Kingdom carrying with them certain articles of their journey (*capitula itineris*) which consisted of a list of questions which they were to submit to the accusing juries. (P. & M., Vol. II, p. 519.) These questions, in so far as material to the case at bar, would be whether there was any man in their county, hundred, or vill who was suspected of being a murderer, etc.[1] They would thereupon make their presentment of such, if any such there were, and would be cross-examined by the justices. Since, however, the conviction of criminals was a source of revenue to the Crown, the cross-questioning was directed to their failure to present, not, as in the case at bar, to their presentments. (P. & M., Vol. II, pp. 643, 644.) There is no suggestion that the justices ever attempted, or claimed the power, to curb the accusing jury in its desire to present that certain persons *were* suspected of being murderers, robbers, etc.

The matter is summed up by Maitland, History of Constitutional Law, as follows (pp. 127, 128):

> The itinerant judges are supplied with lists of inquiries which they are to lay before juries representing the various hundreds which they visit. These lists of inquiries are known as articles of the eyre,

[1] "* * * quod per singulos comitatus inquiratur * * * per sacramentum quod illi verum dicent: si in hundredo suo * * * sit aliquis homo qui sit rettatus vel publicatus quod ipse sit robator vel murdrator * * *." See P. & M., Vol. II, p. 639.

capitula itineris, and in the main they are fiscal inquiries; the royal revenue is the chief end in view. The jurors are to swear as to what profits have fallen to the Crown, as to escheats, forfeitures, marriages, wardships, widows, Jews, treasure trove, and other sources of income; also as to the misdoings of the sheriff and his bailiffs; also as to murders, robberies, and so forth, for crime also brings money to the royal exchequer—for instance there are the murder fines to be collected. It is not improbable that our Norman kings occasionally directed inquisitions of this sort. In Henry the Second's reign, under the Assizes of Clarendon and Northampton, the presentation of crimes by twelve men representing each hundred was made a regular permanent procedure. The twelve sworn hundredors are to present crimes; the persons whom they accuse are to go to the ordeal; if they fail at the ordeal they are to be punished by mutilation. What is more, the Assize of Northampton betrays some mistrust of the efficacy of the ordeal as a means of eliciting the truth, for even if a person thus accused satisfies the test and thus has the judgment of God in his favour, he is to adjure the realm, that is, he is to leave the realm swearing never to return. You observe that these twelve sworn hundredors are sworn accusers; their testimony is not conclusive; their oath does not lead to immediate condemnation; it leads to trial; it puts the accused on his trial; he must go to the

> ordeal. In short, they are the ancestors of our grand jurors, not of our petty jurors, and their sworn accusation is an indictment. For the rise of the petty jury we must look elsewhere. But let us pause to remark that these measures of Henry the Second institute a new mode of procedure in criminal cases; they put the indictment by the side of the appeal. Thenceforward English law has two criminal procedures; there is the appeal—a private accusation brought by the person primarily wronged by the crime, the person, e. g., whose goods have been stolen, or the nearest kinsman of the murdered man; then there is the indictment—the sworn accusation of twelve men who have sworn to present the crimes committed within their hundred. These two modes of procedure live side by side until modern times; the appeal of felony was not abolished until 1819; the indictment we still have, though in course of time its real nature has undergone a great change.

According to all the authorities we have been able to find there has been no change in the nature, functions, or power of the grand jury in any respect material to the case at bar from the time of the Assize of Clarendon to the present day. Houldsworth (History of English Law, Vol. I, p. 148) says:

> The grand jury of modern times still retains some traces of antiquity which have been lost to other branches of the jury.

> They deliberate in secret. They are not controlled or advised by the court. The court merely charges them generally as to the business which will come before them. They can act if they please on their own knowledge. They are acting much in the same way as they acted in the thirteenth century.

Maitland (History of English Constitutional Law, pp. 211, 212) says:

> The commonest procedure in criminal cases involves the use of two juries, an indicting and a trying jury, or, as we say, a grand and a petty jury. The grand jury is a body of twenty-three persons representing the county, sworn to present criminals. In the past the theory has been that such a jury accuses men of its own knowledge, and, even in our own day states that the jurors say upon their oaths that A, of malice aforethought did slay and murder B. As a matter of fact, however, what happens now is this—and we may perhaps carry back the change as far as Henry VII's day—some person who believes that A has committed a crime goes before the grand jury and profers a bill of indictment, a document stating that A has murdered B. The grand jurors hear the evidence for the prosecution, and if they think that this makes it probable that A is guilty, then without hearing any evidence for the defence they write on the bill "a true bill,"

and then A has to take his trial before a petty jury; if, however, they think that there is no ground for suspicion, they write "no true bill"—the old phrase was "Ignoramus"—we know nought of this—the bill is said to be ignored, and A goes free, *though he is liable to be indicted another time for the same offence*—he has had no trial, and is not acquitted. A majority of the body of twenty-three grand jurors decides whether the bill shall be ignored or no. So much as to the grand jury. [Italics ours.]

Stephen (History of Criminal Law, Vol. I, p. 253) states:

> The system of accusation which led up to, and to use a modern legal expression "sounded" in ordeal, was the origin of the grand jury of later times, and of our own days.

He follows this in a subsequent chapter with the statement (Vol. I, pp. 273, 274):

> The indictment being drawn has indorsed upon it the names of the witnesses, and the solicitor for the prosecution takes it and them to the grand jury room, to which he is admitted or not as the grand jury think proper. The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor, if he is admitted. The name of each witness examined before the grand jury is initialed by the foreman; and

> when they have heard enough to satisfy themselves that a *prima facie* case is or is not made out against the prisoner, they indorse upon the indictment "a true bill," or "no true bills," as the case may be (in the days of law Latin the endorsements were "Billa Vera," or "Ignoramus"), and come into court and hand the indictments to the clerk of assize or clerk of the peace, who says, "Gentlemen, you find 'a true bill,' or 'no true bill,' as the case may be, 'against A. B. for felony or misdemeanor.'" If the finding is "no true bill" the matter drops and the prisoner is discharged, *though he is liable to be indicted again.* If the finding is "a true bill," the trial proceeds and the "bill" becomes an indictment. As an indictment must be found by a majority of the grand jury, and as it must also be found by twelve grand jurors at least, grand juries are generally composed of twenty-three persons, so that the smallest possible majority may consist of twelve. They may, however, consist of any number not less than twelve. [Italics ours.]

None of the early authorities on criminal law indicates any disposition to allow the justice power to control the action of a grand jury on the matter of returning an indictment when that body has determined solemnly and upon its oath that a named person is suspected of being a murderer, robber, etc. The subject is considered collaterally in Coke's Littleton, 126 b., as to the meaning of an

indictment, and in 2 Institutes 739 as to the difference between a presentment and an indictment. Neither Bacon's Abridgement nor Comyn's Digest gives any cases indicating a restriction on the power of the grand jury to return an indictment according as they saw fit. Hale (Pleas of the Crown, 1st Am. ed. 1847, p. 151) merely states:

> *Presentment* is a more comprehensive term than *indictment,* for regularly an indictment is an accusation given *in* against a person by the grand inquest for some misdemeanor whereunto he is put to answer; but presentments do not only include such indictments, but also some other informations whereunto the party is not put to answer, as presentments of *felo de se,* of *fugam fecit,* of deodands, of deaths *per infortunium,* and many others.

Hawkins, stating the law later and perhaps as it is generally understood, says (Pleas of the Crown, Vol. II, c. 25, p. 299):

> An indictment is an accusation at the suit of the King, by the oaths of twelve men of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true.
>
> But when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *Presentment.*

> And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *Inquisition.*

None of the other books treating of criminal procedure in the English courts has anything to contradict the historic, firmly established, and ingrown notion that the grand jury is an independent body, charged merely with the duty of investigating and presenting all violations of law supposed to have happened within its jurisdiction. It is incredible that if the right of a grand jury to return an indictment without the consent of the justice on eyre, or on oyer and terminer, or of the coroner on an inquest, or of the local authorities on preliminary examination, or other proceedings before them, was doubtful, no discussion of the subject can be found. It must be presumed that the independence of the grand jury was so connected with the reasons for its original institution, and has been found so useful under changed conditions, as to be accepted *sub tacito* and thus to have become an essential element of the law relating to the subject.

(b) Certain matters relative to the grand jury and its indictments, according to the common law of England, have a special bearing on the case at bar:

(1) The oath of the grand jury, as quoted above from the Assize of Clarendon, is expanded

in time and is given in *Lord Shaftesbury's case* (1681), 8 State Trials 759, 771, 772:

> You shall deligently inquire, and true presentments make of all such matters, articles, and things as shall be given you in charge, as of all other matters and things as shall come to your own knowledge touching this present service; the King's counsel, your fellows and your own, you shall keep secret.

In spite of the ruling in *Shaftesbury's case, supra,* to the effect that witnesses before the grand jury could be examined in open court, it has become well established in accord with the above oath that the proceedings before the grand jury are secret. (See the *State* v. *Fasset* (1844), 16 Conn. 467.) Such being the case, it is evident that the court can have little control over the actual proceedings. In *Burr's case* an attempt was made to have the Chief Justice charge the grand jury specially as to the evidence it should receive, but it seems to have been unsuccessful. (Burr's Trial, Robertson ed., pp. 172–175.) In the case against Knapp for the murder of Captain White, Chief Justice Parker denied such a request saying:

> The law reposes confidence in the officers of the Government, in relation to this subject. If anything improper shall be given in evidence before the grand jury, the

error may be corrected subsequently upon the trial before the petit jury. (9 Pick 495, 7 Am. St. Tr. 410.)

If the proceedings of the grand jury are secret and not subject to the control of the court, it can hardly be law that all their independent action can be rendered nugatory and idle by the existence of a right in the court to refuse to allow a presentment or indictment, the fruit of all their labors, to be made or filed. The present powers of grand juries in the United States courts are considered in *Hale* v. *Henkel,* 201 U. S. 43, 59–66, and held to be the same as, and fully equal to, the powers of such bodies under the common law of England, and this view was affirmed in *Blair* v. *United States,* 250 U. S. 273. The fair inference from these opinions is that the fundamental power of the grand jury to make presentments or indictments in regard to alleged violations of law brought to their attention through proper channels not soiled by malice, bias, or mere suspicion is not subject to a power in the court of rejection of such presentments or indictments.

(2) It is settled by the common law of England that—

(x) The pendency of a prior indictment is not a good plea to a subsequent indictment for the same offense;

(y) The pendency of such an indictment or of an information is not a good plea in bar to a subsequent information for the same offense;

(z) The ignoring of an indictment by a grand jury is not a good plea to a subsequent information for the same offense.

The authorities on these points are as follows:

(x) In *Sir William Withypole's case,* Cro. Ca. 147, the defendant pleaded that he had been previously arraigned upon an inquest before the coroner for the same offense and had pleaded to this inquest. The Court of King's Bench held:

> That this was no cause of plea; for where he is not convicted or acquitted he may be arraigned upon a new indictment; but to avoid that doubt, that he should not be questioned upon both, it was ruled that *the first* should be quashed as insufficient. [Italics ours.]

In the case of Elizabeth Jeffreys for the murder of her uncle, reported in Foster's Crown Law, 104, there was a difficulty as to whether her accomplice, a servant of the victim, should not be indicted for petty treason, a curious relic of allegiance. The court said (p. 106):

> The court was of opinion that the charge in the bill last found must be answered, notwithstanding the pendency of the former, for *auterfoits arraign* is no plea in this case. Perhaps the bill last found is better adapted to the nature of the case than the former, and the King's council must be at liberty to prosecute in such manner as may best answer the ends of public justice. But at the same

> time the court must take care, that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact.

Hale says, undoubtedly relying on the above authorities and his knowledge of the established practice (Pleas of the Crown, Vol. II, p. 239):

> If A be indicted of the murder of B and there is another indictment afterwards taken of the same death against the same person, and he is arraigned upon the second indictment, because it is the King's suit the second shall not abate; yet usually the justices quash the other by judgment.

Hawkins' (Pleas of the Crown, vol. 2, c. 34, p. 523) says:

> SEC. 1. First. That it hath been holden that it is no good plea in abatement of an indictment as it is of an appeal or information,[1] that there is another indictment against the defendant for the same offence. But in such a case the court, in discretion, will quash *the first indictment* if any fault can be found with it. [Italics ours.]

In *Regina* v. *Goddard*, 2 Ld. Raym. 920, there was an indictment for forging an assignment of a lease. Certain technical objections were made to the indictment which the court would not listen to because a new indictment had been presented.

[1] By this word "information" he means an information *qui tam*. See *Queen* v. *Mitchell*, St. Trs. n. s. Vol. 6, pp. 565, 566.

The defendant thereupon asked the court to dispose of the old indictment before requiring him to plead to the new. The court said, presumably through Holt, C. J.:

> They would make no bargain with them. A man could not plead over in any case, but in treason and felony, and not in a case of misdemeanor; and that a man, after he has been found guilty, can't plead that indictment depending in abatement, but must plead *autrefois convict.*
>
> And the defendants pleaded to the new indictment.

In *King* v. *Webb* (1764), 3 Burr 1468, the defendant was indicted, at the instance of a private prosecutor, for perjury, and pleaded "Not guilty." Before the case came up for trial the prosecutor obtained a new indictment, claiming that the original indictment was defective. Upon the case being brought to trial on the first indictment the prosecutor moved to quash it. It was objected that the indictments were mere pretexts and that the name of the prosecutor should be divulged. Accordingly a stipulation was entered into that the new indictment should stand in the place of the old, and that the prosecutor was "John Wilkes, late of Great George Street, Westminster, Eng." Wilkes, however, had got away into France, and was in no position to prosecute other people. The court was angry about it and thought he should pay costs, but there was no

suggestion, from a hostile bench, that a second indictment, procured at the instance of a private prosecutor, needed the consent of the justices to make it valid.

In the *King* v. *Dr. Wynne* (1802), 2 East 226, a private prosecutor moved to quash an indictment procured by him because it was defective. Upon objection, Grose, J., after consulting with the officers of the Crown office (for precedents), said:

> * * * that he was not aware that the consent of the defendant was necessary for quashing an indictment even after plea pleaded; but that the court had laid down a rule to govern their discretion in such cases in general, in order to avoid collusion; and therefore they thought it more advisable to let this rule be enlarged, so as to give time to the prosecutor, if so advised, to prefer another indictment before they disposed of the present rule.

The general rule established in England by the above authorities was followed in this country in *People* v. *Monroe* (1838), 20 Wend 108, where it was held that the finding of a second indictment is not of itself a supersedeas of the first, and that it is within the discretion of the court whether the first shall be quashed or not. (Accord, *Com.* v. *Drew*, 3 Cush. 279, 282; *Smith* v. *Com.*, 104 Pa. St. 339, 341.)

In the cases of Senator Burton, 196 U. S. 283, 202 U. S. 344, an indictment was found for a viola-

tion of section 1787, R. S., and the defendant was convicted. This judgment of conviction was reversed and the case remanded for a new trial. (196 U. S. 308.) Thereupon "*the Government elected* not to proceed under that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case." This court said:

> Its right to adopt that course cannot be questioned. (202 U. S. 380.)

It is clear, therefore, that, according to the common law, it was not a good plea to an indictment nor good ground for a motion to quash it that the matter charged in it had been covered by a prior indictment.

(y) Upon this point the authorities, so far as we have been able to find them, are as follows:

In *Rex* v. *Purnell* (1748), 1 Wm. Blackst. 37, an information *ex officio* was filed against the vice chancellor of Oxford for neglect of duty. A nolle prosequi was entered to this information and a second filed for the same offense to which the defendant pleaded. Evidently such procedure was thought proper by everyone concerned.

In *King* v. *Stratton,* 1 Doug. 239 (1779), the Solicitor General moved to quash an information *ex officio* on the ground that another was ready to be filed which stated the offense more particularly and was better adapted to the nature of the

charge. The motion was denied, Buller, J., saying:

> What the solicitor has stated, viz, that the pendency of the first information would be no plea to the second, is decisive against this motion.

Lord Mansfield suggested that the proper course was an entry by the Attorney General of a nolle prosequi.

> In consequence of this decision the Attorney General entered a nolle prosequi on the original information and in the same term filed the following information. (21 St. Trs. 1049.)

The case of *Rex* v. *Alexander* (1830) is thus stated in Archbold, Criminal Pleading, 24th ed., pp. 149, 157:

> Nor will the court, upon the application of the defendant, restrain the Attorney General from filing an ex officio information upon the ground that a criminal information has already been granted for the same cause. But in that case, after both informations had been filed, the court stayed the *criminal information* until further order. [Italics ours.]

In the *Queen* v. *Mitchell,* 3 Cox C. C. 93, 6 St. Trs. n. s. 545, it was objected to an information *ex officio* that an indictment for the same offense was

pending. Lord Blackburne said (6 St. Trs. n. s. 565):

> * * * the question then is this, Is the plea of an indictment depending a bar to this information for the same matter? In support of the affirmative that it is, there is neither precedent, the authority of any case, the dictum of any judge, nor even the opinion of any text writer: but, on the other hand there are authorities that such a plea is utterly invalid.

To sum up the above, it seems clear that the pendency of an indictment or information is no defense to a subsequent indictment or information for the same offense, based upon the same facts. Moreover, it will not be claimed, we think, that the subsequent indictment or information requires leave of court any more than the prior one; and we shall attempt to show later in this brief that an original indictment or information does not require such leave. The authorities cited above are, in our judgment, inconsistent with the notion that the second indictment or information, a prior one pending, requires any additional sanction from the court before it can be legally filed.

It necessarily follows that the case at bar, in so far as the point now under consideration is concerned, must turn entirely upon the datum that there has been a previous action by the proper authority adverse to the charge of the State.

Where such previous action has been the refusal of the Attorney General or his authorized representatives to file an information, *cadit quaestio*, unless an information, whenever filed, requires for its validity leave of court. That it does not, we shall attempt to show later, as this point can be better dealt with upon the assumption that an indictment has been ignored by the grand jury, and an information subsequently filed for the same offense upon the same facts.

(z) The question under this heading is whether an information can be filed by the Attorney General or his representative after a grand jury has refused to indict for the same offense upon the same facts. The authorities upon this point are given below. It should be remembered in considering them that correct principles require the conclusion which they reach. That is, they assume a fundamental belief in the entire legality of an information after an ignoramus of a grand jury, which fundamental belief is sound according to the well-established custom and usage in respect to the filing of informations. According to the common law, the procedure by way of indictment, or by way of information, was regarded as entirely elective—two strings to the bow of the State—and no claim to the contrary was ever successful.

In *Zenger's case* (1735), 17 St. Trs. 675, there was an indictment for seditious libel which excited the greatest interest in this country. The

grand jury refused to return a true bill. (17 St. Trs. 677.) Thereupon an information was filed by the Attorney General for the same offense upon the same facts, which Zenger describes as follows (17 St. Trs. 683):

> * * * and the grand jury having found nothing against me, I expected to have been discharged from my imprisonment, but my hopes proved vain, for the Attorney General then charged me by information for printing and publishing parts of my Journals Nos. 13 and 23, as being false, scandalous, malicious, and seditious.

The report shows that he was, as he was entitled to be, ably and fully represented by counsel; yet he pleaded to the information, and his counsel, who seem to have taken advantage of every point, never thought of objecting that an information could not be filed after an ignoramus by a grand jury. It may be claimed that in fact the information in the Zenger case was approved by the court, which certainly was not favorable to Zenger. We answer first, that, at the time in question, no court would have questioned the right of the Attorney General to file an information without leave of court, and, second, if any such point had been arguable at the time the counsel for Zenger would not have failed to argue the injustice of presentation of an information by the Attorney General after

an ignoramus by a grand jury. As a matter of fact they did nothing of the kind but confined themselves to an entirely different line of argument.

As to the case of the *King* v. *Forbes et al.* (1823), we have merely the reference to it in *Queen* v. *Mitchel, supra,* as the "Bottle Conspiracy case" (because the gentlemen concerned threw glass bottles at the Lord Lieutenant of Ireland at a theatrical performance), and the report of Plunket's speech as Attorney General in 2 St. Trs. n. s. 939. The record, however, as printed in 2 St. Trs. n. s., sufficiently discloses that the matter of the offense had been presented to a grand jury which had refused to return an indictment (as any other good Irishmen would have done). On account of this action the Attorney General filed the information in question. The defendant pleaded to it, evidently, although we do not know what the verdict was. However, Plunket as Attorney General made the following statement, which, we think, expresses the law (2 St. Trs. n. s. 945):

> So far from its being considered an objection that a grand jury has ignored the bill, it is often a reason why the Court of King's Bench grants an information. I have often applied for liberty to file an information, when I had the honour of practising in this court; and the court has asked me whether I had tried a grand jury, say-

ing, that if they refused to file a bill, they would then entertain the application. The Court of King's Bench in England in the last term granted an information in a case where bills had been twice ignored by a grand jury, and because they had been ignored. So far, therefore, is that circumstance from being considered an objection to putting a party on his trial, that it is frequently insisted upon as a requisite condition. Thus it is where application is made to the Court of King's Bench. This is an information filed by the sworn officer of the Crown, in whom the law has vested that privilege. Were I to come in as Attorney General and apply for liberty to file an information against these parties, what would be your lordship's answer? The same as was given by my Lord Mansfield to De Grey, and I think to Sir Fletcher Norton, namely, "We will not file an information at your suit; the law has made you the sole judge of its propriety; if you think it proper you have a right to file it; if not, why should we do so?" * * * I am asked for an authority; permit me to say this is not quite a fair requisition; where a circumstance is totally immaterial, it is not to be expected that it should be the subject of notice; and therefore we are not to be surprised, if in the greater number of reported cases of informations it should not appear whether a grand jury had previously thrown out bills or not; such a fact would be totally immaterial.

> It cannot be stated in a plea; it could not be proved in evidence, and therefore it would be too much to say that because it is not mentioned the case has not existed.

In *Rex* v. *Green,* 1 Lord Kenyon's Notes 379, it was said that the failure of a grand jury to indict was a reason why the court should grant leave to file an information where such leave was necessary.

In the following cases it was held that an information could be filed by the Attorney General or his representative in spite of the fact that a grand jury had previously refused to indict, viz: *Ex parte Moan,* 65 Cal. 216, 218, 219; *State* v. *Ross,* 14 La. Ann. 364, 367 (and see *State* v. *Vincent,* 36 La. Ann. 770); *State* v. *Whipple,* 57 Vt. 637, 639, 640. The case of *State* v. *Boswell,* 104 Ind. 541, which seems to hold contra, may be explained by the fact that the information was for a felony, as permitted by an Indiana statute, and the court held that the statute, being in derogation of the common law, must be strictly construed. (See also *State* v. *Roberts,* 166 Ind. 585, 590–592; *Hall* v. *State,* 99 N. E. 732, 733.) The only case we have found squarely contra is *Richards* v. *State,* 22 Neb. 145.

In this connection we should state that, as we understand the law, leave of court is not required for the filing of an information *ex officio* by the Attorney General. In *Rex* v. *Phillips,* 3 Burr, 1564, the Attorney General moved for leave to

file an information. The court refused it "because the Attorney General has a right, himself, *ex officio,* to exhibit one." Lord Mansfield told him "that he must use his own discretion." The rule was different as to an information filed by anyone except the Attorney General, and this may have led to some confusion in this country. The Constitution of the United States says nothing about informations, but it is clear that crimes not infamous may be prosecuted in the Federal courts by information. (*United States* v. *Maxwell* (1875), 3 Dill, 275; *Ex parte Wilson,* 114 U. S., 417, 424, 425.) It is equally clear that the only information known to the Federal courts is that *ex officio* by the Attorney General or his representatives, private prosecutors not being permitted in such courts. (Justice Field to the grand jury, 2 Sawyer, 667.) That being so, we submit that the rule of the Federal courts is that of the common law, viz, that leave of court is not necessary for the filing of informations. The matter is fully considered by the Court of Appeals for the Second Circuit in *Weeks* v. *United States,* 216 Fed., 292, where it is held that an information in the Federal courts is the information *ex officio* of the common law and is subject to the same rules of procedure. It is said (p. 297):

> If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled

> to proceed upon information, and that without leave of the court and without affidavit.

It is further stated on page 298:

> We think that the weight of authority is that in this country, as the text writers assert, the information used by the prosecuting officers are the informations used by the Attorney General in England and not those exhibited by masters of the Crown and which were governed by 4 and 5 William and Mary, c. 18. And as at common law an information could be filed by the Attorney General simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary, unless required by some constitutional or statutory provision. (*Long* v. *People,* 135 Ill., 435, 25 N. E., 851, 10 L. R. A., 48; *People* v. *Graney,* 91 Mich., 646, 52 N. W., 66; *State* v. *Pohl,* 170 Mo., 422, 70 S. W., 695; 22 Cyc., 281.[1])

It is stated generally in 22 Cyc., 261, that no leave of court is required for the filing of an information in the absence of a statute. There is no Federal statute requiring such leave. On the contrary, section 1022, R. S., provides:

> All crimes and offenses committed against the provisions of chapter seven,

[1] The *Weeks case, supra,* is approved as to the general principles stated therein in *Creekmore* v. *United States,* 237 Fed., 743, 747 (C. C. A. 8th); *Abbot Bros.* v. *United States,* 242 Fed., 751 (C. C. A. 7th); and *Kelly* v. *United States,* 250 U. S., 947 (C. C. A. 9th).

> title "Crimes," which are not infamous, may be prosecuted either by indictment or *by information filed by a district attorney.* [Italics ours.]

These italicized words clearly exclude the necessity for consent of court. It is true that the statute only applies to a limited class of crimes, but this court said in *Ex parte Wilson,* 114 U. S., 417, 421:

> The provision of Rev. Stat., § 1022 * * * does not preclude the prosecution by information of other offenses of such a grade as may be so prosecuted consistently with the Constitution and laws of the United States.

As it does not preclude such informations, so it lays down the condition which Congress thought should hold consistently as to all, viz, filing by a district attorney. We admit that there are decisions or dicta in several Federal cases holding leave of court necessary to the filing of an information, e. g., *United States* v. *Smith,* 40 Fed. 755; *United States* v. *Maxwell,* 3 Dillon, 275 (the dictum of Dillon, J., being contrary to the opinion of Justice Wilson, cited by him); *United States* v. *Wells,* 225 Fed. 320; (but see contra Justice Field in *United States* v. *Waller,* 1 Sawyer, 701). In these cases, however, the point does not seem to have been controverted or carefully considered; section 1022, R. S., is not noticed; nor is any reason advanced why an information in the Fed-

eral courts should require leave of court any more than an information *ex officio* at the common law.

In *United States* v. *Nagle,* 17 Blatch. 258, Benedict, J., said:

> The fact that these same defendants were indicted by the grand jury for the same offense described in this information, which indictment was quashed because of insufficient averments, affords no ground whatever upon which to ask that this information be quashed. The district attorney had the right to proceed by information, notwithstanding the fact that, on a former occasion, he had elected to proceed by indictment and had submitted the case to the consideration of a grand jury.

We submit, therefore, that the law as to the nature of informations is correctly stated in *Weeks v. United States, supra,* and that leave of court is not required for their filing.

If this be true, and if it be also true that an information may be filed after a grand jury has ignored an indictment for the same offense on the same facts, a strong reason is presented for holding that an indictment may be presented by a grand jury under the same circumstances without leave of court. Otherwise, the rule as to the filing of informations would be different upon the same point from the rule as to presenting indictments, misdemeanors could be resubmitted without leave of court, but felonies not, a conclusion which this

court certainly will not approve unless compelled to by urgent reasons or authority.

(3) It is settled by the common law as interpreted by the English courts that a charge may be resubmitted to a subsequent grand jury after it has been ignored by a previous one.

(m) It should first be noted that leave of court is not requisite as a general thing to the presentment or return of an indictment. By the act of 22d and 23d Vict., c. 17 (1859), it was provided that no bill of indictment for any of certain specified offenses should be presented to or found by a grand jury unless such indictment had been preferred by the direction or consent of one of the judges or by the Attorney General or Solicitor General. This statute clearly demonstrates that at the common law the direction or consent of the judges was not required, even for an indictment preferred by a private prosecutor. This is also clearly the rule in the Federal courts, as can be seen from Justice Field's charge to the grand jury, 2 Sawyer, 667, *United States* v. *Fuers,* 25 Fed. Cas. 1223, and *United States* v. *Thompkins,* 2 Cranch. C. C. 46. It also follows, necessarily, from the opinions of this court in *Hale* v. *Henkel,* 201 U. S. 43, and *Blair* v. *United States,* 250 U. S. 273, 282, for the right of a grand jury to investigate at its own instance alleged violations of law, affirmed in those cases, involves the right to return an indictment without leave of court.

(n) In 4th Blackstone Comm., p. 305, it is said:

> When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill "*ignoramus*," or we know nothing of it, intimating that, though the facts might possibly be true, that truth did not appear to them; but now, they assert in English, more absolutely, "not a true bill," or (which is the better way) "not found;" and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury.

This view is followed by Chitty Crim. Law, Vol. I, p. 325:

> If the bill be not found, or if the indictment is defective, a new and more regular one may be framed and sent to the same or another grand jury for their finding.

The decisions on the point are as follows:

In *Rex* v. *Killminster* (1835), 7 Car. & Payne, 228, a bill of indictment had been preferred against the defendant but ignored, and the present one was returned some years later. The case turned on the statute of limitations, but the court would not have considered this point if it had supposed that the second indictment was bad because the charge had been previously ignored—consent of court evidently not having been obtained to the second.

In *Reg.* v. *Humphreys* (1842), 1 Car. & Marsh, 327, Patteson, J., held that

> if the grand jury at the assizes or sessions have ignored a bill, they can not find another bill against the same person for the same offense *at the same assizes or sessions.*

In the *Queen* v. *Newton* (1843), 2 Mood & Rob., 503 (s. c. the *Queen* v. *Simmonite,* 1 Cox. Cr. Cas. 30), Wightman, J., disagreed with *Reg.* v. *Humphreys,* saying:

> Though some inconvenience may possibly arise by permitting a grand jury which has ignored one bill to find another for the same offence, I can see no objection in principle to its being done. It is clear that another bill might be sent in to another grand jury, and I can see no reason why it should not be sent before the same.

However, in *Reg.* v. *Austin* (1850), 4 Cox. Cr. Cas. 385, he seems to have reconsidered this view, but only as to a resubmission *to the same grand jury.*

It is clear, therefore, that by the common law of England a charge or matter submitted to and ignored by one grand jury may be resubmitted to another and an indictment found thereon without leave of court. Consequently the law is so stated in Archbold Cr. Pleas & Pr., 24th Eng. Ed. 103, and Halsbury Laws of Eng., Vol 9, p. 347, note (m).

(4) The decisions in this country are, so far as we can discover, all to the same effect, *in the absence of statute.*[1]

In *Fitch* v. *The State* (1820), 2 Nott. & M'C (S. C.) 558, the grand jury returned "no bill." The solicitor announcing his intention of preferring a new bill, the defendant contended that he must show cause to the court therefor. The contention was overruled. The court said:

> It is not to be supposed that the solicitor in the exercise of a discretion with which he is invested, would use it in an arbitrary or oppressive manner, nor would it be consistent with justice, that an offender should be permitted to withdraw himself from an accusation where in the opinion of the solicitor, his guilt might be made to appear more fully before another grand jury.

In *Knott* v. *Sargent* (1878), 125 Mass. 95—an action for malicious prosecution—it appeared that plaintiff's case had been submitted to a grand jury which returned "no bill." This was held no sufficient ending of the case, the court saying:

> The mere return of "no bill" by the grand jury did not operate as a legal discharge of the accused, and did not necessarily import that the same or a subsequent

[1] The statutes in several of the States requiring action by the court before resubmission of charges to a second grand jury are themselves evidence that at the common law such consent was not necessary.

> grand jury might not find a bill upon the same complaint.

(See also *Com.* v. *Woods,* 10 Gray, 477, 479, 483.)

In *Christmas* v. *The State* (1874), 53 Ga. 81, the defendant presented an order for his discharge on the ground that two successive grand juries had returned "no bill." The court held:

> Under the facts stated in the judge's certificate, to wit: That on this application being made, the Solicitor General replied that he was about to present another bill, and that he expected to prove the two "no bills" had been procured by the fraud of the defendant, we think it was eminently proper in the judge to refuse the order asked for.

In *State* v. *Brown* (1879), 81 N. C. 568, it was held that a new bill could not be submitted by the solicitor to the same grand jury, but could be to another; but in *State* v. *Harris* (1884), 91 N. C. 656, even this limitation was disapproved, and it was held that a new bill could be submitted to the same grand jury on the authority of Chitty and the English authorities cited above.

In *Ex parte Clarke* (1880), 54 Cal. 412, the petitioner was in custody under a warrant issued by a magistrate after the charge against him had been ignored by a grand jury. The court, after deciding that the case was outside

the California statutes permitting the judge to resubmit a case to the grand jury, held that the petitioner was legally held, saying (54 Cal. 415):

> Inasmuch as there is no limitation of time applicable to prosecutions for *murder*, and as a defendant in whose favor an order of dismissal of the action has been made, has never been put in *jeopardy* within the meaning of the Constitution, a new action on behalf of the people may, in such case be initiated at any subsequent day, either by presentment of a grand jury or by a complaint filed with any magistrate.

In *State* v. *Green* (1892), 111 Mo. 585, the following statement sufficiently shows the point raised and the decision thereon:

> II. Nor could the action of the court be sustained on the fourth ground of the motion, "that a former grand jury had ignored the bill." Neither the mere finding, or refusing to find, an indictment by one grand jury will affect the power of another grand jury to indict.

In *State* v. *Collis* (1887), 73 Iowa, 542, it appeared that a previous grand jury had refused to find an indictment against the defendant and that a subsequent grand jury had indicted him *suo intuito* without resubmission by the court, although an Iowa statute provided that without a direction by the court a charge could not be resubmitted. It was held that the statute did

not apply to the independent action of the grand jury, the court saying:

> But the power of the grand jury in the premises is not dependent upon the order or direction of the court; its powers and duties are prescribed by other provisions of statute. The oath which is administered to the members of the grand jury requires them to make diligent inquiry and true presentment of all public offenses against the people of the State, committed or triable within the county, of which they have or can obtain legal evidence. (Code, § 4268.) And section 4272 provides that " the grand jury has power, and it is made its duty, to inquire into all indictable offenses committed or which may be tried within the county, and present them to the court by indictment." The general nature of the powers and duties imposed upon the grand jury by these provisions is in no manner qualified or limited by section 4290.

In *State* v. *Reinhart* (1895), 26 Oregon, 466, while the exact point involved was the power of a grand jury to return an indictment pending another for the same charge, the court approved of *State* v. *Collis, supra,* saying:

> It is also claimed that the power of the grand jury is at an end when it returns an indictment into court, and that it can not afterwards return another indictment against the same defendant for the same offense, unless, by order of the court, the

> case is resubmitted to them. But we can find no warrant in law for this contention. By their oaths, grand jurors are bound to true presentment or indictment make of all crimes committed or triable within their county that shall come to their knowledge (Hill's Code, § 1236); and in discharge of this obligation they not only have the right, but it is their duty, to return a new indictment against a defendant, if, in their opinion, the former indictment, which is still pending and undisposed of, is defective or insufficient, unless some proceeding has been had on such indictment which amounts to a bar to further prosecution. This is said to be the better and more usual practice (*Perkins* v. *State*, 66 Ala. 457; *Stuart* v. Com., 28 Grat. 950); and the power of the grand jury in this respect is not dependent upon the order of the court resubmitting the cause to them (*State* v. *Collis*, 73 Iowa, 542, 35 N. W. 625).

The exact point involved in *State* v. *Collis*, *supra*, arose in *Marshall* v. *State* (1907), 84 Ark. 88, and was decided the same way, the court saying:

> It is the function of the grand jury, therefore, to investigate and reinvestigate concerning matters within their jurisdiction as often as they "have knowledge or may receive information," and the statute under consideration is not intended to limit or restrain that function. The Supreme

Court of Iowa under a similar statute and in a similar case so holds. (*State* v. *Collis*, 73 Ia. 542.)

In *People* v. *Rosenthal* (1910), 197 N. Y. 394, 400, 401, there was an order of resubmission which was invalid, but upon which a new indictment was procured. The court held that the case was not one requiring resubmission under the statute, and that, therefore, the second indictment was good.

The case of *Whiting* v. *State* (1891), 48 Ohio St. 220, 230, 231, involved only the right of the grand jury to return a substitute indictment without reexamination of witnesses, but the language of the court as to the powers of grand juries generally is favorable to our claim.

The courts of Pennsylvania take a more restricted view of the powers of grand juries than do the courts of the other States (as was noticed by this court in *Hale* v. *Henkel*, 201 U. S. 43, 64, 65), and perhaps the district judge may have been influenced by this in his decision in the case at bar. And yet, upon the precise point here involved, the courts of Pennsylvania, we submit, are not clearly contrary to the other authorities.

In *Rowand* v. *Commonwealth* (1876), 82 Pa. St. 405, the defendant moved to quash an indictment on the ground that a previous bill for the same offense had been ignored and the present one preferred without the direction of the court. The

lower court denied the motion saying (82 Pa. St. 406):

> Ordinarily an ignoramus should be the end of the case. If I were acting on my own judgment I would quash these indictments, but as I have been informed that the course pursued in these cases has been always sustained by this court, I shall conform to that practice, and refuse these motions.

His judgment was affirmed, but the Supreme Court stated that while the prosecuting officer had the authority to resubmit a case, such authority was subject, in the ordinary case, to the supervision of the trial court, saying (82 Pa. St., 409):

> While, however, the possession of this exceptional power by prosecuting officers can not be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity it is the duty of the Quarter Sessions to set the officer's act aside. Where a defendant has been once discharged on a return of "ignoramus," a new bill sent up without a fresh hearing, and without the leave of the court, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need. In the present instance, the Court of Quarter Sessions must be assumed to have approved the

> action of the district attorney. The defendant has been tried, convicted and sentenced on the bills sent to the second grand jury. If there was wrong it was one which the Quarter Sessions could alone redress. This court is powerless to interpose.

Accordingly, it has been held by the lower Pennsylvania courts that the right of the prosecuting attorney to resubmit a bill is subject to some kind of supervisory authority in the trial court. (*Com.* v. *Leigh,* 38 Leg. Int., 184; *Com.* v. *Priestly,* 10 Dist., 217; *Com.* v. *Whitaker,* 25 Pa. C. C., 42.) And yet in *Com.* v. *Snyder* (1903), 13 Pa. Dist, Repts., 27, it was squarely held that a charge of larceny could be resubmitted without leave of court, notwithstanding *Rowand* v. *Com., supra.* The court said:

> There seems to me to be quite a distinction between the sending of a bill based upon the same complaint the second time to the same grand jury after it has been ignored by them, and an original prosecution for the same offense returned to another grand jury at another session. In the first instance, the complaint is dead unless the court sees fit to revive it by permitting the case to be again sent to the same or a subsequent grand jury. In the latter case the prosecutor makes a new complaint, and the case comes again into the court to be passed upon, the prosecutor being liable, however, to answer in an action for ma-

> licious prosecution in case it is ascertained that he acted maliciously and without probable cause in making the second complaint. I can find no authority which decides that another complaint can not be instituted before a justice and returned to another sessions; and by what means a court is to ascertain from a mere inspection of the record that the complaint thus made is for the same offense as that which was formerly presented, I am unable to see.

It thus seems that even in Pennsylvania there is a right to resubmit a new bill (as in the case at bar) without leave of court; but even if this be not true to its full extent, yet the supervisory power of the court is not unlimited but is directed merely to correcting the action of the prosecuting officer if it seems to have been improperly taken. The Pennsylvania cases, therefore, would not, it seems, sustain the ruling of the district judge in the case at bar, since the latter did not ask for any showing by the district attorney of his reasons for resubmitting the matter but quashed the indictment because it had not been approved by him and because in his judgment it should not have been returned.

The law of the Federal courts upon this subject is clearly the common law and not the law of the State where the court sits—e. g., Pennsylvania—and therefore, even if there were no decisions bearing upon the point in the Federal courts, the law there would be presumed to be in accord with

the authorities on the common law quoted above. There are, however, decisions which sufficiently establish that the Federal courts have expressly adopted the common law on this subject.

In *United States* v. *Martin* (1882), 50 Fed. 918, Paul, D. J., said:

> In this case the defendant moves to quash the indictment on the ground that it was found by a grand jury of this court at Lynchburg in March, 1892, after a grand jury of this court at a court held at Danville in November, 1891, had reported the indictment "not a true bill." I do not think this motion can be sustained either by the practice in Virginia or by the doctrine generally held by the American courts. The doctrine in this State and the other American States is that the ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense.

In *United States* v. *Bopp* (1916), 232 Fed. 177, it was held that after a demurrer had been sustained to an indictment another one could be preferred without any order of resubmission by the court.

Reference is also made to *Burton* v. *United States*, 202 U. S. 344, 380, heretofore referred to.

But we place our main reliance upon the principles laid down by this court in *Hale* v. *Henkel*, 201 U. S. 43, repeated in *Blair* v. *United States*,

250 U. S. 273. It was there held that a grand jury of the United States has the same powers as the grand jury under the common law of England and among them the power to make investigations *ex mero motu* and to return indictments based upon such investigations. It follows necessarily from this, we submit, that the grand jury has this same power, irrespective of the action of a prior grand jury, and that this power can not be hampered and rendered ineffective by a supervisory power in the District Court to reject the presentment or indictment, which is the culmination and end of the labors which this court held the grand jury could lawfully of its own instance enter upon.

Upon principle, irrespective of the authorities, while there may be danger of persecution in permitting grand juries to reconsider *ad libitum* charges ignored by former grand juries, there is a greater danger in giving a sanctity to the action of one grand jury which shall completely protect the criminal from prosecution unless the court can be induced to authorize a resubmission. In the former case the defendant still has his right to a trial by the petty jury with the benefit of the presumption of innocence. In the latter the combination of a biased, capricious, ignorant, or corrupt grand jury, with a judge having any one of these qualities, would result in complete immunity to the person charged with crime and operate as an entire and final bar to any prosecution of him by the State upon such charges.

It is clear, as stated above, that leave of court is not required as a general thing for the presentment of an indictment by the grand jury. The only claim is that this general power is taken away in certain cases by the action of a prior grand jury. But if each grand jury has a power of independent investigation and decision, as it surely has, how can such power be affected and determined by the decision of another independent body, there being no connection or privity between the two? The evils which are asserted to lie in unrestrained grand jury proceedings are as great in regard to the action of the first as to the action of the second or subsequent grand juries, and, as a matter of fact, the principal conflict of opinion has been on the point whether *every* grand jury investigation must not be preceded by trial before and binding over by a magistrate (a necessity denied by this court in *Ruthenberg* v. *U. S.*, 245 U. S. 480, 482, 483). Therefore, when it has been determined that the law does not require either a hearing before a magistrate or the approval of the court as a condition precedent to original action by a grand jury, the real point at issue has been decided, and it follows almost of necessity that such hearing or approval is not essential to a second, but independent investigation.

Section 1 of the act of March 3, 1865, c. 86, 13 Stat. 500 (the basis of sec. 808 R. S. 282 Jud. Code), speaks of grand juries impaneled " to

inquire into and presentment make of public offenses against the United States committed or triable within the district for which the court is holden"; and section 813 R. S. (which, though repealed, may be looked to on this point) provided that "the grand jury impaneled and sworn in any district court may take cognizance *of all crimes and offenses* within the jurisdiction of the circuit court for said district as well as of said district court." These statutes are a legislative recognition of the functions and duties of grand juries as extending to the investigation and indictment of all crimes and not merely of those which have not been ignored by a previous grand jury. So as to the United States attorney, section 771 R. S. provides that "it shall be the duty of every district attorney to prosecute in his district *all* delinquents for crimes and offenses cognizable under the authority of the United States." This duty to prosecute includes submitting a matter or charge to the grand jury (*Post* v. *United States,* 161 U. S. 583), and is not limited by the statute to those delinquents whose cases have not been ignored by a defunct grand jury. In short, there is no reason or authority for limiting the power of the district attorney or of the grand jury by a reference to the past actions of a grand jury of a prior term of court.

While the above is, we believe, sufficient to show the lack of jurisdiction in the district court to quash the indictment in the case at bar for the

reason assigned, it should be noted that the first grand jury did not formally vote "no bill" as to the charges presented by the second grand jury, but that the district attorney withdrew the charges on perceiving the attitude of the first grand jury. (R. 87.)

B. THE REMEDY.

I.

The Judgment Sustained a Special Plea in Bar.

(a) It is admitted that unless the judgment of the District Court quashing the indictment (Rec. 98) was a

> "* * * judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy,"

the United States has no right to a writ of error under the provisions of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

(b) It is settled by the decision of this court in *United States* v. *Barber,* 219 U. S. 72, 78, that the name given to a pleading does not determine its true character under the act of March 2, 1907. That is to say, if the motion to quash the indictment filed May 7, 1918 (Rec. 77), was in substance a plea in bar, if it had all the essential characteristics and effects of such a plea, the mere nomination of it as a motion to quash would not prevent this court from treating it as a plea in bar, nor the judgment upon it as a judgment sustaining such a plea. This, we assume, will be admitted.

(c) In *United States* v. *Oppenheimer,* 242 U. S. 85, where this court treated a motion to quash as a plea in bar, it is said at page 87:

> Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another.

Adopting this principle the only question is whether the judgment of the District Court in the case at bar is one quashing a bad indictment or whether it is one based upon the ground that prosecution against Thompson is barred as matter of substantive law.

(d) The ground of the motion, in so far as it was sustained by the court, and the ground of the judgment quashing the indictment was solely this, viz: The very matter and substance of the indictment had been presented to a grand jury at a prior term of court; that grand jury had ignored the charges and had explicitly refused to vote a true bill based upon them; they were nevertheless submitted to the subsequent grand jury of the March, 1916, term without first submitting them to the court and obtaining its approval; and the presentment based upon them and the bill of indictment based upon the presentment had never received such approval. In addition the judgment sustaining the motion

to quash operated necessarily as a refusal by the judge to grant such approval, since, if he had thought that (now the matter was submitted to him) the charges were ones which might be acted upon by the grand jury, it was, without question, his duty to confirm his prior tentative action allowing the bill to be filed. In *Commonwealth* v. *Sheppard,* 20 Pa. Sup. Ct. 417, 419, the court said:

> In such cases, that is, where the indictment is sent up by the district attorney without first obtaining the leave of the court, the discretion of the court may be invoked, and is exercisable upon a motion to quash. If the court refuses to quash, this, ordinarily, is equivalent to giving its sanction. If the court sustains the motion to quash, this is tantamount to refusing its approval of the action of the district attorney.

The judgment of the court therefore was in effect that no indictment for these particular offenses could ever be submitted against Thompson in that district.

Is such a judgment one holding that the particular indictment in question was bad, or is it one holding that the prosecution is barred as a matter of substantive law?

It is clear that the motion to quash and the judgment sustaining it were not based on any defects in the indictment as a pleading—e. g., that it was indefinite or did not contain the es-

sential allegations. On the contrary, the motion set up a rule of substantive law which, if sound, barred any prosecution of Thompson on these particular charges. That rule, when analyzed, contained two clauses and was this:

> (1) An indictment can not be resubmitted to a grand jury without the consent of the court;
>
> (2) The court has power to refuse such consent, and to prevent the filing of the indictment, or to strike it from the files if it has been placed there without its consent.

The judgment of the court affirmed and acted upon this rule in both its clauses; first, asserting the nullity of the indictment without the consent of the court, and second, refusing to grant that consent. It even went further. Having allowed it to be filed *sub modo*, it revoked the order of filing and withdrew it from consideration by a jury. It was on principle the same thing as though the court had sustained a plea of *res adjudicata*, or *autrefois acquit*, on account of what had happened before the first grand jury. The holding was, in effect, that the combination of an ignoramus by a grand jury and a refusal of the court to resubmit constituted a bar to any prosecution of the charges in question. As the charges involved a felony, prosecution by information was impossible. Such a judgment is in substance one sustaining a special plea in bar which is thus de-

fined in Clark's Criminal Procedure, page 382, § 134:

> A special plea in bar does not go to the merits and deny the facts alleged in the indictment, but sets up some extrinsic fact, by reason of which the defendant can not be tried at all for the offense charged.

In 13 Cyc. 361, it is said:

> In a criminal prosecution defendant may and should plead specially in bar any matter in confession and avoidance constituting a defense, and not admissible under a plea of not guilty.

The motion to quash in the case at bar when given its true meaning, as shown by analysis, set up extrinsic matter in confession and avoidance, not pleadable under the general issue, and constituting a reason why the defendant could not be tried at all for the offense charged. It was, therefore, a special plea in bar within the meaning of the act of March 2, 1907, c. 2564.

II.

The action of the court below was not taken in the exercise of any judicial discretion, but was totally outside of the power conferred upon it by law, and may, therefore, be controlled by writs of mandamus and prohibition from this court.

(*a*) The principles of law governing the granting of these writs is thus stated by Mr. Justice Moody, speaking for the court, in *In re Winn*, 213 U. S., 458, 465–468.

> Authority to issue writs of mandamus to any courts appointed under the authority

of the United States was given to this court by a provision in the original judiciary act, which now appears in § 688 of the Revised Statutes. A writ of mandamus issued under this provision is for the purpose of revising and correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. *Marbury* v. *Madison,* 1 Cr. 137; *Ex parte Yerger,* 8 Wall., 85, 97; *In re Green,* 141 U. S. 325, 326.

In *Ex parte Crane,* 5 Pet. 190, the court of its own motion considered and sustained its authority to issue mandamus to inferior courts, and in that case directed by mandamus a judge of an inferior court to sign a bill of exceptions duly presented. Since that time writs of mandamus to inferior courts have been issued in all proper cases.

In *Ex parte Bradley,* 7 Wall. 364, it was held that a mandamus from this court would lie to an inferior court of the United States, directing it to restore an attorney to the rolls who had been disbarred where the court was without jurisdiction in that regard. And it was said (p. 377): "The ground of our decision * * * is, that the court below has no jurisdiction to disbar the relator. * * * No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject matter is not be-

fore it; the proceeding is *coram non judice* and void."

A specific application of the general principle announced in *Ex parte Bradley* has been made to cases where Circuit Courts of the United States have, without authority, assumed jurisdiction of a case originally brought in a State court, and it has frequently been held that mandamus from this court would lie to compel a Circuit Court to remand a case to the State court where it is apparent from the record that the Circuit Court has no jurisdiction whatever of the case. *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449. And see *Matter of Dunn*, 212 U. S. 374.

* * * * *

The respondent, however, insists that mandamus will not lie to control the judgment or judicial discretion of the court to which the writ is proposed to be directed. This is true where the judgment or judicial discretion is within the limits of jurisdiction, but not otherwise. Wherever the record, including the petition for removal, shows that there are questions of fact upon whose determination the right of removal depends and upon which it is the duty of the Circuit Court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion, and if that

discretion is erroneously exercised it can be corrected only by a writ of error or appeal. In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or appeals or take their place where they offer an adequate remedy to the aggrieved party. It is only in cases where the record makes it clear, as matter of law, that the Circuit Court was without jurisdiction to take any action whatever that the writ of mandamus lies. This distinction has been acted on many times by this court, and it is enough to refer to two very recent cases. Thus where the removability of a case turned upon the question whether there was a separable controversy, to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability; that its decision in that respect was the exercise of judicial discretion and could not be controlled by a writ of mandamus. *In re James Pollitz,* 206 U. S. 323. The same point was decided in *Ex parte Nebraska,* 209 U. S. 436. In each of these cases a distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached, and the right to a writ of mandamus in the latter case was affirmed.

As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record in the case at bar, and does

not, as in *In re Pollitz* and *Ex parte Nebraska,* depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue.

In *Life & Fire Ins. Co.* v. *Wilson,* 8 Pet. 291, 304, a mandamus was granted to compel the trial court to sign the record of a judgment which he thought he ought not to do, because rendered by his predecessor.

In *Ex parte United States,* 242 U. S. 27, a mandamus was granted to compel the trial court to vacate an order suspending the execution of a judgment in a criminal case, because the court had no power to make such order.

In *Ex parte Simons,* 247 U. S. 231, a mandamus was granted to compel the trial court to vacate an order transferring a cause to the equity side, and to take jurisdiction of it as a common law court.

In *United States* v. *Mayer,* 235 U. S. 55, 70–72, the power of the Circuit Court of Appeals to issue a writ prohibiting the trial court from vacating a judgment of conviction in a criminal case and granting a new trial was sustained.

These authorities are decisive of the right to mandamus and prohibition in the case at bar.

The question, in so far as the issuance of these writs is concerned, is precisely the same as though the court had refused at the very

outset to allow the bill of indictment of the second grand jury to be presented or filed, assigning as a reason therefor, not his conclusion in regard to disputed questions of fact, but an erroneous conception of the law governing the undisputed facts. It is exactly as though the court had refused to allow the bill to be filed because it was not engrossed on parchment, or because it was not written in law-latin, or because one of the grand jurors was a Negro. Clearly such refusal to assume jurisdiction where the law on the undisputed facts imposed it can be corrected by mandamus. In *State* v. *Quarles*, 13 Idaho, 252, it appeared that one Scott had been held to answer to the district court on a charge of criminal libel. On motion the court dismissed the complaint. The prosecuting attorney thereupon presented an information for the same offense which the clerk, acting on instructions from the court, refused to file. It was held that mandamus lay to compel the filing, the court saying (13 Idaho, 256):

> In prosecuting offenses by indictment the grand jury finds the indictment, and under the provisions of section 7669, Revised Statutes, when an indictment is found, it must be presented by the foreman to the court in the presence of the grand jury and must be filed by the clerk. The court has no authority to prohibit the clerk from filing such indictment when so pre-

> sented, and in the case of prosecuting cases on information the law makes it the duty of the prosecuting attorney to prepare the information and present it to the clerk for filing during term time, and when so presented it is the duty of the clerk to file it, and the law clearly points out the proceedings that may be had after the filing of the indictment or information. The court is not required to determine against whom information may be filed; that is the duty of the prosecuting attorney, and the judge can not exercise that duty or prohibit the clerk from filing an information presented to him for filing by the prosecuting attorney.

The fact that in the case at bar the court approved the presentment and allowed the filing, reserving the right to subsequently quash the indictment, does not weaken the case for a mandamus. On the contrary, it raises an additional doubt as to the power of the court, for it may well be claimed that the court exhausted its right of rejection (if it had any, which we deny) by once permitting the bill to be filed, and that it could not, after such filing and after the lapse of two years (due to defendant's applications for continuance, which assumed the formal existence of the bill), go back to the beginning and exercise an alleged power to prevent the very inception of the prosecution.

CONCLUSION.

The judgment of the court below should be reversed, or the writs of mandamus and of prohibition should issue as prayed.

ALEX. C. KING,
Solicitor General.
ROBERT P. STEWART,
Assistant Attorney General.
W. C. HERRON,
Attorney.

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IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1919.

The United States of America, Plaintiff in Error, v. **Josiah V. Thompson,** Defendant in Error.		No. 250.

In Error to the District Court of the United States for the Western District of Pennsylvania.

—o—

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

—o—

STATEMENT OF CASE.

As this case now stands there are three separate and distinct matters presented for the consideration of your Honorable Court.

A.

Did the presiding judge of the District Court of the United States for the Western District of Pennsylvania err in granting the motion of the defendant in error to quash the indictment found against him by the grand jury, sitting at the city of Erie, at No. 17 March Term, 1916, of said Court?

B.

Was the decision of the Court below quashing said indictment of such a character as to entitle the Gov-

ernment to have the same reviewed in this court by writ of error under the provisions of the Act of March 2, 1907, C. 2564, 34 Stat. 1246?

C.

If the said judgment of the court below is not reviewable, should this court issue writs of mandamus and prohibition to the court below directing it to vacate the said order quashing said indictment, and prohibiting it from striking said indictment from the files of said court.

The question above stated under (B) is raised by our motion to dismiss the writ of error, filed Oct. 6th, 1919, and the question above stated under (C) is raised by the Government's motion for leave to file petition for writs of mandamus and prohibition, made upon the same date; upon each of which motions your Honorable Court has postponed further consideration until argument upon the merits.

We have printed and filed with our "Motion to Dismiss" our argument in support of said motion, and have printed and filed a separate argument against the application of the Government for writs of mandamus and prohibition, to which separate briefs your Honorable Court is respectfully referred; and shall, therefore, confine this brief chiefly to a discussion of the question above stated under (A), viz, whether the court below erred in sustaining our motion to quash the indictment in question.

Availing ourselves of the privilege accorded us under paragraph 3 of rule 21, we desire to submit a counter statement of facts; not so much because we controvert such facts as the learned counsel for the Government have stated in their brief (pages 1 to 9), but rather because all the facts which we consider ma-

terial to a correct understanding of the case have not been stated.

We also feel that counsel for the Government endeavor to give the impression that the second grand jury of its own initiative exercised some power or prerogative, which the Government contends it possessed, to inquire into the alleged violations of law ignored by the previous grand jury, whereas the fact is that the second grand jury did nothing of its own motion but acted solely as the result of an investigation conducted before it by the United States Attorney and his associate.

Again we feel that it is scarcely fair to the court below to give the impression that it quashed the second indictment "because it had not received the approval of the court" (Government's Brief p. 9); when it is clear from the record as a whole that the indictment was quashed because of certain acts and procedure upon the part of the United States Attorney which the lower court deemed illegal and unwarranted, viz, the resubmission to a subsequent grand jury, without the knowledge, permission or approval of the court, of certain criminal charges ignored by a former grand jury.

Therefore we respectfully submit the following:

STATEMENT OF FACTS.

(1.) On January 18, 1915, the First National Bank of Uniontown, Pa., situated and doing business in the Western District of Pennsylvania, was closed by order of the Comptroller of the Currency, and all its books, records and papers passed into possession of representatives of the government.

(2.) It being alleged by the representatives of the government that an examination of said books and

records disclosed that Josiah V. Thompson, the defendant in error in this appeal, had, as president of said bank, committed various violations of the banking laws of the United States, the United States attorney for said district, instead of having an information made before a United States Commissioner, requested the presiding judge of the District Court of the United States for the Western District of Pennsylvania, sitting for the November term, 1915, in the City of Pittsburgh, Pa., to call the attention of the grand jury, in attendance for said term in said city, to said allegations, and to direct said grand jury to inquire into same; whereupon said court gave the matter in charge of said grand jury.

(3.) During the first, second and third days of February, 1916, the said grand jury heard certain witnesses previously subpoenaed by the representatives of the government, and, on February 4th, 1916, made its presentment to said court at No. 21 November term, setting forth that on the 15th day of October, 1914, and at divers other times and dates prior thereto and thereafter, the said Josiah V. Thompson wilfully misapplied certain of the moneys, funds and credits of the said bank "and did make and cause to be made, certain false entries, both in the books of said bank and in certain reports made to the Comptroller of the Currency, and in addition thereto did swear falsely in connection with certain of said reports made to the Comptroller of the Currency;" and requesting that the United States attorney be instructed to lay before it a bill or bills of indictment more particularly and at length setting forth said violations of law (Printed record, p. 5.)

(4.) Thereupon the United States attorney for said district forthwith laid before said grand jury an indictment containing 47 counts (Opinion of Court

below, printed record, p. 94,) 17 of which counts charged unlawful certification of checks, false entries in books of the bank and in reports to the Comptroller, and false swearing in affidavits to reports to the Comptroller of the Currency, and the remaining 30 counts charged misapplication, abstraction and embezzlement of the moneys of said bank (Opinion of the Court below, printed record, pp. 94-95.)

(5.) The said grand jury, so as aforesaid sitting for the said November term, at Pittsburgh, refused to indict the said Josiah V. Thompson on said 30 counts charging misapplication, abstraction and embezzlement of the said moneys of said bank (Opinion of Court below, printed record, p. 95;) but were willing to indict said defendant upon said 17 counts charging the unlawful certification of checks, false entries in the books of the bank and in reports to Comptroller, and perjury.

Whereupon the said United States attorney for said district withdrew from said grand jury said indictment containing said 47 counts and presented to it a new indictment containing only the said 17 counts of said original indictment charging unlawful certification of checks, false entries in books of the bank and in reports to Comptroller and perjury, which indictment, (Printed record, p. 8-30) was returned a true bill to No. 21 November term, 1915, of said court, and is the indictment referred to in this case as the "Pittsburgh Indictment."

(6.) Under date of March 17, 1916, the Attorney General addressed a letter to Mr. Wrisley Brown, stating that under authority of the Act of Congress approved June 30, 1906, the said Wrisley Brown was specifically authorized and directed to conduct grand jury proceedings in the western district of Pennsylvania, in the case of United States vs. Josiah V.

Thompson, former president of the First National Bank of Uniontown, Pennsylvania, for violation of the National Banking Laws (Printed record, p. 4.) This authorization was submitted to the Clerk of the Court and marked filed by him on March 20, 1916, but was not placed among the records of the court, nor brought to the attention of the trial court until the motion to quash had been decided, when it was produced by the District Attorney (Opinion of Court below, printed record, p. 95.)

(7.) The next term of the said District Court of the United States for the Western District of Pennsylvania was the March term, 1916, and the sessions of said court were held in the City of Erie in said district.

(8.) On or prior to March 24, 1916, the United States attorney for said district and the said special representative of the Attorney General "without the knowledge, approval or direction of the Court having charge of the grand jury and their proceedings" (Opinion of Court below, printed record, p. 95) conducted before the grand jury, summoned for and attending upon the said March term of said court held in the said City of Erie, another and separate investigation into the said allegations that the said Josiah V. Thompson had, as the former president of the said First National Bank of Uniontown, Pa., committed violations of the banking laws of the United States, and recalled before the said grand jury, sitting at Erie, practically all of the witnesses who had testified before the previous grand jury sitting in the City of Pittsburgh.

(9.) On March 24, 1916, the said grand jury sitting at Erie made its presentment to said Court setting forth that on the 15th day of October, 1914, and at divers times and dates prior thereto and thereafter,

the said Josiah V. Thompson, then president of the First National Bank of Uniontown, Pa., "did wilfully misapply and abstract certain of the moneys, funds and credits of the said First National Bank of Uniontown, Pa." In the presentment, after stating that the aforesaid violations of law had come to the knowledge of the said grand jury through the evidence of certain witnesses sworn before it, the said grand jury further requested that the United States attorney be instructed to lay before it a bill or bills of indictment, more particularly and at length, setting forth said violations of law (Printed record, p. 31.)

(10.) Upon the presentation of this presentment to the Honorable Charles P. Orr, the District Judge then presiding in said Court, he expressed himself orally as follows:

> "This presentment presented by the grand jury is received by the Court. The Court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district and they were authorized to present a bill embracing the matters which appear in this presentment. The Court authorized them to bring in a bill in accordance with their presentment.
>
> "This matter is again brought to this subsequent grand jury without the knowledge or the permission of the Court, and the Court is of the opinion that there should have been an application to this Court for a resubmission of this matter to a new grand jury, or that some action of the Court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done, and inasmuch as you have made this presentment, the Court will permit you to bring in a bill of indictment in accordance with the presentment, the Court reserving, however, the legal question as to whether or not the

indictment so brought in should be and remain a true bill against the defendant." (Opinion of Court below, printed record, p. 95.)

(11.) The said representatives of the government thereupon presented to said Erie grand jury an indictment containing only the identical above mentioned thirty counts charging misapplication, abstraction and embezzlement of the moneys of said bank, which had been so as aforesaid ignored by the previous grand jury sitting at Pittsburgh (Opinion of Court below, printed record, p. 94) and the said grand jury on said 24th day of March, 1916, returned an indictment containing said thirty counts, which is found in the printed record at pp. 32 to 76, and is referred to in this case as the "Erie Indictment."

(12.) The said indictments were listed for trial upon several occasions, but the cases were continued on December 30, 1916, April 14, 1917, and October 16, 1917, on the petitions of the defendant, his Receivers, and the Josiah V. Thompson Creditors' Committee.

(13.) On October 19, 1917, the Attorney General, under authoirty of said Act of Congress of June 30, 1906, (34 Stat. 816) extended the appointment of Sylvester R. Rush, Esq., to include the case of the United States vs. Josiah V. Thompson and authorized and directed him to conduct grand jury proceedings in the western district in connection with said case (Opinion of Court below, printed record, p. 96.)

(14.) Both indictments were listed for trial at Pittsburgh on the 2nd day of the May term, 1918, to wit, May 7th, 1918, and upon that date the defendant was for the first time called upon by the government to plead to said indictments, it being the purpose of the government to try the defendant on both indictments at the same time.

(15.) Upon being called upon to plead to said indictments, the defendant, through his attorneys, before plea pleaded and jury sworn, filed motions to quash each of said indictments, the motion to quash the "Erie Indictment" being found at p. 77 of the printed record. The motion to quash the "Pittsburgh Indictment" is not included in the record now before the Court. The reasons therein assigned were not deemed sufficient by the Court to entitle the defendant to have this indictment quashed and it therefore remains for trial in the Court below.

(16.) After argument, the Court, on May 8, 1918, overruled the motion of the defendant to quash the "Pittsburgh Indictment" at No. 21 November term, 1915,, but sustained the defendant's motion to quash the "Erie Indictment" at No. 17 March term, 1916, for the reasons stated by the Court at pp. 79 to 82 of the printed record.

(17.) On May 17, 1918, the representatives of the government moved the Court for a re-hearing on the motion to quash the said "Erie Indictment" and to vacate and set aside the judgment quashing said indictment (Printed record, pp. 82 to 85.)

(18.) On the same day the said Honorable Charles P. Orr, presiding in said Court, filed a memorandum entering a rule upon the defendant to show cause why a rehearing should not be had of the motion to quash, (Printed record, p. 92.)

To this rule the defendant filed his answer on May 25th, 1918 (Printed record, pp. 86 to 92.)

On the same day the Court ordered and directed, pursuant to an agreement of counsel, that the said judgment entered on May 8, 1918, quashing said indictment be suspended, vacated and set aside pending

the argument and the disposition of said rule to show cause (Printed record, p. 93.)

(19.) On July 10, 1918, the United States attorney for said district filed a demurrer to said motion to quash said indictment (Printed record, p. 93.)

(20.) Argument having been had upon said rule and answer, the said Honorable Charles P. Orr, presiding in said Court, on September 27, 1918, filed an opinion (Printed record, pp. 94 to 97) overruling the motion for a re-hearing of the motion to quash, and overruling the demurrer filed on behalf of the United States to the motion to quash, and directing judgment to be entered upon the motion to quash, which had been suspended pending the disposition of said rule for a re-hearing.

(21.) On October 19, 1918, the Court entered its final judgment discharging the rule to show cause why a re-hearing should not be had on the motion to quash the indictment, dismissing said motion for a re-hearing, overruling the demurrer and ordering and directing that final judgment be entered quashing said indictment (Printed record, pp. 97-98.)

(22.) On October 26, 1918, the United States sued out the present writ of error from the said District Court of the United States for the Western District of Pennsylvania to the Supreme Court of the United States (Printed record, pp. 99-100.)

(23.) On October 6th, 1919, the defendant in error filed a motion to dismiss said writ of error upon the ground that the order of the court below quashing the indictment was not reviewable; and on the same date the Government filed its motion for leave to file a petition for writs of mandamus and prohibition to the court below directing it to restore the indict-

ment to the files of the court and prohibiting it from striking it from said files.

QUESTION INVOLVED.

We cannot agree with the statement of the question involved as printed by the learned counsel for the Government at the bottom of page 9 of their brief.

As we understand the case, the court below never ruled that its approval of the indictment was necessary, nor did it refuse to allow the indictment to be presented and filed. What it did rule was that the procedure adopted by the United States Attorney for the purpose of securing the indictment was so illegal and so subversive of the substantial rights of the defendant as to vitiate the entire proceeding and render the finding of the grand jury invalid.

We therefore respectfully submit the following:

COUNTER STATEMENT OF THE QUESTION INVOLVED.

Did the court below err in holding, under the circumstances of this case, that the proceedings taken by the representatives of the Government in resubmitting to a subsequent grand jury, without the knowledge, approval or direction of the court, criminal charges against the defendant which had been ignored by a prior grand jury, were in violation of law and tended to impair the substantial rights of the defendant (Record p. 95.)

ARGUMENT.

I.

That portion of the argument of counsel for the Government found at pages 10 to 36 of their brief relative to the historical origin and independent powers of the grand jury, and supporting the proposition that, **in proper cases**, an information may be filed by a prosecuting officer, without leave of court, against a defendant, containing the same charges that a grand jury has ignored, is learned, interesting and instructive, but inapplicable to the issues arising in this case.

There was, and under our constitution and laws there could be, no information filed against the defendant in error for the offenses charged in the indictment, because the crimes therein charged are infamous within the meaning of our constitution.

It is idle to argue that because in some possible cases the United States Attorney might have filed, without leave of court, an information charging offences ignored by a grand jury, he was at liberty in this case to resubmit ignored charges of infamous crimes to a subsequent grand jury without the knowledge or approval of the court.

No matter what independent powers a grand jury may have to inquire, upon their own motion, into alleged or suspected violations of law, and prefer presentments and indictments, the fact is, that in this case, the grand jury did not exercise any such power **upon its own initiative**, but, **on the contrary**, acted solely at the instance of the United States Attorney and his associate, and based its presentment upon the testimony of witnesses called before it by said representatives of the Government.

The above mentioned portion of the argument for

the Government is based upon a misapprehension of the action of the lower court, and of its reasons for such action, and utterly ignores the method by which the United States Attorney proceeded to procure this indictment.

At page 10 of the Government's argument it is stated that the court had no power "to refuse to allow an indictment to be presented and filed," etc.; and again, at page 48, that the court quashed the indictment "because it had not been approved by him and because in his judgment it should not have been returned."

An examination of the motion to quash (Record p. 77) and of the ruling of Judge Orr sustaining said motion (Record pp. 79-80) and of his opinion sur motion to show cause why a re-hearing should not be had of the motion to quash, (Record pp. 94-97) demonstrates that the Court below did not undertake to control the action of the grand jury **upon any matter properly before it,** but quashed the indictment on account of what the court below considered illegal and unwarranted procedure upon the part of the United States Attorney in re-submitting the charges ignored by the Pittsburgh grand jury to the Erie grand jury, without the knowledge or approval of the court.

At the time the motion to quash the Erie indictment was sustained, the court, after refusing to quash the Pittsburgh indictment, said (Record pp. 79-80.)

> "With respect, however, to the motion to quash the indictment designated in the argument as the "Erie Indictment," at No. 17 March term, 1916, this court has reached a different conclusion.
>
> It appears that the matters embraced within that indictment were the identical matters submitted to the grand jury which found the former

bill at Pittsburgh, in addition to the matters specially charged in that bill. (The Pittsburgh bill.)

It appears further that those matters were not included in the indictment at the Pittsburgh term, and were not deemed by that grand jury to be charges for which the defendant should be brought to trial.

The re-submission of those matters to the later grand jury at the Erie term was without the knowledge or approval of the court. The re-submission of the offenses against the Government to a new grand jury is a matter of highest prerogative, and is always subject to the control of the court, and, in proper cases, always granted by the court.

In this case, it does not now appear that there was an absence of evidence when those matters were first submitted at Pittsburgh; it does not appear of record that any application to the court was made for a re-submission of those matters to the Erie grand jury.

Again, it appears from briefs of counsel acting on behalf of the Government in this case, and from statements made by them, that there was a special designation by the Attorney General of some one to attend the sessions of the grand jury at Erie and proceed with the investigation.

We have, then, a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant, who was not indicted by the first grand jury, which, according to its presentment, had not sufficient evidence before it to justify the indictment, and which, according to the facts as found, contained the same matters as the later grand jury found in its indictment.

I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and, therefore, I must

sustain the motion to quash the indictment found at Erie, and note an exception to the Government."

Again in his written opinion, Judge Orr used the following language (Record pp. 95-96.)

> "The substantial reason for sustaining the motion to quash the indictment as expressed at the time of such ruling was that the proceedings taken as they were without the knowledge, approval, or direction of the court having charge of the grand jury and their proceedings, were in violation of law and tended to impair the substantial rights of the defendant."
>
> * * * * * * * * *
>
> "That the court which by statute is required to direct the summoning of grand juries, and by statute also is authorized to discharge them, has full control oved their proceedings is a principle of law which can not at this day be controverted. The re-submission of a case to the same or a new grand jury is often allowed by the court, but only upon some showing that such re-submission should be made in the interest of justice. To permit the submission of the same matter to repeated grand juries until one is found favorable to pressure of the prosecution would be violative of the substantial rights of citizens.

We therefore submit that the fundamental question involved in this case is not with respect to the power of the Erie grand jury to inquire into and make presentment of the alleged violations of law by the defendant in error, if such matters had been given them in charge by the court; or even to reconsider the charges considered and ignored by the Pittsburgh grand jury, if the representatives of the Government had applied to the court for, and upon a proper showing, had obtained permission to bring such charges to the attention of the second grand jury—but rather,

whether the representatives of the Government were justified in re-submitting to the subsequent grand jury, without the knowledge or approval of the court, the indentical charges which had been ignored by a prior grand jury.

That the charges submitted to the subsequent grand jury were the identical charges and no more which had been considered by the prior grand jury, and that the prior grand jury had ignored these charges are facts found by the court below in its opinion, and admitted by the United States Attorney at the time of the argument of the motion to quash the second indictment, (Record p. 95), and it is therefore improper for the counsel for the Government to attempt to quibble, as they do at p. 53 of their brief, with respect to whether the charges in question were formally voted "no bill" by the first grand jury, or were withdrawn by the District Attorney.

No matter how the United States Attorney manipulated the procedure before the first grand jury, the substantial fact as found by the court, and admitted by the United States Attorney at the time of the argumen upon the motion to quash the indictment, is that the first grand jury considered and refused to indict the defendant in error upon the identical thirty (30) counts re-submitted to the second grand jury.

II.

ILLEGALITY OF METHODS PURSUED BY UNITED STATES ATTORNEY WHEREBY "ERIE" INDICTMENT WAS PROCURED.

The matters submitted by the United States Attorney and his associate to the grand jury at Erie, in March, 1916, resulting in the finding of the second in-

dictment, being the identical charges, and no more, that had been ignored by the Pittsburgh grand jury in February, 1916, were submitted without the knowledge, approval or direction of the court having charge of said grand jury and their proceedings.

We earnestly contend that under the attendant circumstances, this was an act upon the part of the United States Attorney which was not a prerogative of his office, was without sanction of law, and amounted to an usurpation of authority.

The necessary result of such procedure upon his part was to vitiate the entire proceeding and render the indictment procured thereby invalid, and the court below, therefore, committed no error in quashing the indictment, because it had been procured by a method which invaded the substantial rights of the defendant therein.

We respectfully submit that the rule to be deduced from a consideration of all the authorities is that criminal charges which have been ignored by a grand jury may be re-submitted to the same, or a subsequent grand jury, but only with the knowledge, and express approval and consent of the proper court, obtained upon cause shown.

That this rule obtains strictly in the Commonwealth of Pennsylvania is demonstrated by the decisions of the highest court in that state.

There is no federal statute expressly governing this question of procedure and we respectfully submit:

(a) That federal courts will follow and be governed by the practice of state courts in matters not otherwise provided for in federal procedure, where the same is not inconsistent with the constitution and laws of the United States; and

(b) That the order or judgment of the court below in quashing the indictment in question was entire-

ly in keeping with the general rule of law and particularly with the practice in such matters in the Pennsylvania Courts wherein the exercise of such supervisory power is recognized as a justifiable and proper act of judicial discretion.

In support of proposition (a) we submit the following authorities:

STATUTORY PROVISION SUPPORTING THIS PROPOSITION:

> "The jurisdiction in civil and criminal matters conferred on the District and Circuit Courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, and are deficient in the provisions necessary to furnish suitable remedies and punish offences against the law, the common-law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, **shall be extended to and govern the said courts in the trial and disposition of the cause**, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."
>
> (R. S. Section 722 Fed. Stat. An., vol. 4, page 529.)

JUDICIAL DECISIONS IN SUPPORT THEREOF:

In the case of the UNTED STATES vs. KILPATRICK, 16 Fed. Rep., 765 (District Court W. D. N. C., 1883), in an opinion sustaining an order quashing an indictment the court said:

"In state courts, where common-law jurisdiction over offences is exercised, the powers and duties of grand juries are more extensive and responsible than in federal courts which have cognizance only of offences defined and declared by acts of congress; * * *

"There is no statute expressly requiring federal courts to conform their practice, pleadings and modes of procedure in criminal trials, to the laws of the state in which they are held.

"There is no common law of the United States, and federal courts derive their criminal jurisdiction entirely from congressional statutes; but, in exercising their functions, they are guided by the rules of the common-law, where there is no national statute regulating their action, and I am of the opinion that, in determining what these rules are, they should be greatly influenced by the decisions of the highest courts of the state in which they administer criminal justice. This course of practice and procedure would be in accordance with the liberal spirit of national legislation in regard to the common-law civil cases in the federal courts. The best interests of the whole country require that there should be as little conflict of opinion and diversity of legal procedure as possible, between the state and national courts that administer justice in the same communities."

In the case of UNITED STATES vs. WELLS, 163 Fed. Rep., 313 (District Court of Idaho, 1908), in an opinion considering a plea in abatement to an indictment the court says:

"In the absence of congressional legislation, the laws of a state wherein a court of the United States is held control the practice before federal grand juries * * * * *."

In CROWLY vs. UNITED STATES, U. S. Sup. Ct. Repts., 48 L. Ed. 1075—opinion by Mr. JUSTICE

HARLAN, discussing qualifications of grand jurors and applicability of local laws, it is held:

> " * * * * * it is manifest that congress intended that criminal prosecutions in the District Court of the United States in Poro Rico, for offences against the United States, should be conducted in the same manner as like prosecutions in the Circuit Courts of the United States; the court in Porto Rico recognizing any valid existing local statute relating to the qualifications for jurors, **just as a circuit court of the United States, in criminal prosecutions, would be controlled in respect of the qualifications of jurors, by the applicable statutes of the state in which it was sitting."**

In the case of the UNITED STATES vs. CLUNE, 62 Fed. Rep., 798 (District Court, S. D. Cal. 1894), in an opinion considering a motion to set aside indictments ROSS, District Judge, said:

> "The question which they (defendants) seek to raise by the motion to quash the indictments is a challenge to the personell of the grand jury. There are no provisions of the United States statutes regulating challenges to such jurors under such circumstances, **and it is therefore proper for the federal court to follow the practice of the state in which it is held with reference to such objections."**

In the case of UNITED STATES vs. MITCHELL, 136 Fed. Rep., 896 (Circuit Court, D. Oregon, 1905,) where it was pleaded that the grand jury returning the indictment had not been regularly organized or empanelled, the Court, in considering the above quoted section 722 of Revised Statutes, with relation to the provisions of an Act of Assembly of the state of Oregon prescribing the qualifications, etc., of jurors, it was held:

> "Under Revised Statutes of the United States,

section 722, providing that when the laws of the United States are not suitable, or are deficient in the provisions necessary to furnish suitable remedies and punish offences, **the common-law as modified by the Constitution and laws of the state, shall goevrn. * * * * No express rule or order has been** adopted in this court (District Court of the United States) conforming the designation and empanelling of juries to the laws and usages of the state courts, **although this court has conformed its practice in that respect to state laws and usages since its organization."**

In UNITED STATES vs. EAGAN, 30 Fed. Rep., 608 (Circuit Court E. D. Mo. 1887), where a plea in abatement had been filed touching the regularity of the organization of the grand jury MR. JUSTICE BREWER, in speaking of the plea, said:

"Many states * * * * have by staute limited to a very narrow extent the challenges which may be made to it, (the grand jury) among those states is Missouri, and by repeated decisions of its Supreme Court, it is beyond question that no matter of this knd could be raised by plea in abatement to an indictment presented in a state court.

"The federal statutes are silent, and contain no express provisions in respect to matter of challenging a grand juror in any way. Section 722 of the Revised Statutes contain this provision:

'The jurisdiction in civil and criminal matters conferred on the District or Circuit Courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. But in all cases where they are not adapted to the object, or are deficient in the provisions necessary to fur-

nish suitable remedies and punish offences against the law, the common law, as modified and changed by the constitution and statute wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.'

'Section 800 (the last clause of which was expressly repealed by the Act of 1879) reads:

'The jurors to serve in the courts of the United States in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors to the highest court of law, etc.'

"Mr. Conkling, in his treatise on the practise of the United States courts, insists that there are cogent reasons for holding that this refers, not to the mere qualifications as to citizenship, age, residence, etc., but that it extends to all the proceedings for challenging and determining the qualifications of jurors, **and to that extent incorporate the laws** of the state. **Clearly with these two sections** of the federal statute we have the right, **if we are not bound in every case in which there is no express provisions of the Federal statute, to apply the provisions and the laws of the state in which the court is held."**

Mr. JUSTICE THAYER, in the same case says:

"Under Section 722 of the Rev. Stat. of the United States (there being no federal statutes regulating challenges to grand jurors) we are authorized, in my opinion, to conform our ruling to the practice which obtains in the state courts of Missouri, etc., etc."

In support of proposition (b), to the effect that

the re-submission of charges once ignored by a grand jury may only be had by leave of court upon proper cause shown, and that the judgment of the court below in quashing the indictment in question because the re-submission of the ignored charges had been made by the United States Attorney without the knowledge, consent or approval, of the court, was in harmony with the general rule of law, and in strict accord with the practice prevailing in such matters in Pennsylvania, we cite the following authorities:

ROWAND vs. COMMONWEALTH, 82 Pennsylvania St., 405.

In this case the Supreme Court of Pennsylvania, in discussing the authority of the district attorney to re-submit to a subsequent grand jury criminal charges which had been ignored by a prior grand jury, said:

> "It is thus apparent that upon considerations involving the maintenance of the public security, it has been found necessary to lodge this extraordinary and delicate authority somewhere, and it is apparent also that it has been lodged in the prosecuting officer of the Commonwealth. It is to be exercised, in the ordinary case, under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both manifest and flagrant. Cases can be conceived when the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment, and in such case it would be the duty of the prosecuting officer to act promptly and upon his own responsibility.
> * * * *

"While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity, it is the duty of the Quarter Sessions to set the officer's act aside. Where a defendant has been once discharged on a return of 'ignoramus,' a new bill sent up without a fresh hearing, and without the leave of the court, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need."

COMMONWEALTH vs. STONER, 70 Pa. Super. Ct., 365.

This case is cited as showing the proper practice where prosecuting officers desire to re-submit ignored charges to the same or a subsequent grand jury, and to show the practice prevailing in Pennsylvania.

The following is quoted from the opinion of the Superior Court:

"An information having been made against the defendant he was, after hearing, held to bail by the magistrate to answer the charge at the next court of Oyer and Terminer. An indictment was presented to the grand jury at the next session of the court and ignored. The district attorney presented his petition to the court and obtained a rule on the defendant to show cause why the case should not be submitted to the next grand jury. The defendant after being served with notice filed an answer, and the court after a hearing ordered that the indictment be submitted to the next grand jury, which was subsequently done and a true bill found. The defendant moved to quash the indictment, upon the ground that the bill submitted to the former grand jury had been ignored, that there had been no new information and that this was a district attorney's bill. The court overruled the motion to quash, which action

is the subject of the tenth specification of error. That it was within the discretion of the court below to permit the district attorney to submit a new bill, after the first indictment had been ignored, is too well settled to require discussion: Rowand v. Commonwealth, 82 Pa. 405; Commonwealth v. Sheppard, 20 Pa. Superior Ct. 417."

COMMONWEALTH v. ALLEN, 14 Pa. Co. Ct., 546:

"Where there is no allegation or proof that a bill was ignored by a grand jury in consequence of oversight, mistake or fraud, or any improper action of the grand jury, or the allegation of new testimony discovered, the court will refuse an application to recommit the bill to a subsequent grand jury.

"The usual method of proceeding is open to the prosecutor. He may institute a new prosecution, based upon the alleged new testimony, if he thinks proper to do so. This will afford to the defendant a preliminary hearing, to which defendants are ordinarily entitled, and is no unfair burden upon the prosecutor.

"To establish a practice of recommitting bills to subsequent grand juries, except in case of mistake, oversight or fraud, or in case of grave emergency or urgent public need, would render it impossible for the court ever to dispose of the public business, as each succeeding grand jury would be kept busy reviewing the action of previous grand juries upon alleged after discovered evidence. Besides, it is not at all certain that by the ignoring of the bill the defendant and his sureties are not relieved from liability."

From COMMONWEALTH vs. WHITAKER, 25 Pa. Co. Ct. 42, we quote the following:

"The action of the grand jury in ignoring an indictment will not be set aside and the matter referred to another grand jury where no adequate

reason is shown for so doing. The same rule applies to the action of the grand jury as to costs.

"From these general observations taken in connection with the recognized principle (Rowand vs. Com., 82 Pa., 405) that the return of 'ignoramus' made on an indictment by a grand jury ought to be the end of the prosecution originating in the information returned by the committing magistrate, it would appear that when the court is asked to set aside the findings of a grand jury, or ignore its action and submit to another grand jury matters once regularly passed upon, an adequate reason for so doing should accompany the request. As appears by the terms of the motion above quoted, there is no allegation of irregularity or misconduct on the part of the grand jury. Neither is there any allegation of after discovered evidence, nor that the party charged may leave the jurisdiction of the court, or of other extrinsic facts indicating a pressing and adequate necessity which, under the law, may justify the exercise of such a power. Rowand vs. Com., supra. It follows, therefore, the return and finding of a grand jury being regular on its face, that there is nothing upon the record to justify the district attorney or the court in pursuing a course which, in the language of the Supreme Court, can only be justified by some 'pressing and adequate necessity.'"

From COM. vs. PRIESTLY, 24 Pa., Co. Ct., 543, we quote the following:

"The court will not, after an indictment has been ignored by one grand jury, send it to another, on the motion of private counsel for the prosecution, in the absence of an allegation of irregularity, oversight, mistake or fraud."

Further in support of our contention that the general rule is as above stated, we quote the following from JOYCE on INDICTMENTS, Section 117:

"When a grand jury has acted upon a bill submitted to them, and it has been returned by them into court either a true bill or not a true bill, such action is final so far as their powers are concerned in respect to that particular bill, and it is a general rule that in such a case the action so taken **cannot be effected by any subsequent reconsideration of the matter by the grand jury of their own volition and without authority from the court to that effect.** * * *

"So in Pennsylvania, it has been decided that when a defendant has been once discharged on the return of 'ignoramus' a **new bill sent up without a fresh hearing and without the leave of court should be promptly quashed in the absence of affirmative proof** that the course taken was required to meet some grave emergency or provide for some public need."

Again another text writer of recognized authority uses the following language:

"If a man be committed for a crime, and no bill be preferred against him, **or it be thrown out by the grand jury,** so that he is discharged by proclamation, he is still liable to be indicted, **though the sending up of a** second bill, after an ignoramus, is an EXTREME ACT OF PREROGATIVE, subject to the revision of the court."

WHARTON'S CRIM. PL. & PRAC. Sec. 446, quoted in U. S. vs. MARTIN, 50 FED. 918.

From 22 Cyc., page 208, we quote the following:

"c. **Leave of Court.** It has been held, even in the absence of a statute, that where a bill of indictment has been ignored or returned 'not a true bill' by the grand jury, **the prosecuting attorney cannot submit another indictment for the same offense without leave of court, which will not be granted unless adequate cause be shown."**

In the case of PEOPLE vs. NEIDHART, 71 New York Supplement, 591,—Foster, J., stated the princi-

ples which should govern the court in disposing of an application by a district attorney for leave to resubmit charges to a grand jury, in the following language:

> "These are applications by the district attorney for leave to resubmit the charges against these defendants to the grand jury. These charges have been passed upon by the February grand jury, which, after due hearing, dismissed them. While the court has power to permit the charges to be again submitted to the grand jury (Code Cr. Proc. Sec. 270), such power should be sparingly and discriminatingly used. It is a practice that ought not to be encouraged, nor granted pro forma. The court should act judicially, and permit such re-submission only when facts are presented which justify such action. No such facts are shown in these two applications. From these applications (and they are substantially similar) only the following, in substance, appears: That the charges referred to were duly submitted to the grand jury, and by them duly dismissed; that deponent does not agree with the grand jury; that deponent is of the opinion that the grand jury misunderstood the law, and, if the charge is again submitted, an 'indictment may be found.' What are the facts which justify these opinions and beliefs? None of such facts are set forth in the affidavit or application. The application, therefore, does not appeal to judicial discretion, and cannot be granted.
>
> "So far as appears, the evidence against these defendants was fully brought to the attention of the grand jury, who may, in a manner, be said to represent the 'common sense,' or consensus of opinion of the entire community. If the facts so proven against these defendants did not appear to them of sufficient importance to justify any prosecution, there and then should be the end of the matter. Such I understand to be the policy and meaning of our law, and the raison d'etre of the grand jury. To permit the district attorney,

because he does not agree with the grand jury, and seemingly for no other reason, to continue resubmitting complaints to other grand juries until one can be found to agree with him, is to place in his hands a power of persecution that I am unwilling to sanction, and which, I am quite sure, he does not desire. The verdict or decision of the grand jury is justly entitled to great weight and should not be lightly brushed aside or ignored.

"It may also be observed that the granting of such application, as of course, minimizes the importance of the grand jury, and tends to encourage in them a careless and superficial examination of the matters submitted to them. 'Interest reipublicae ut sit finis litium' is as true in the administration of the criminal law as it is in equity. Application denied."

STATE v. TOWERS, Annotated Cases, 1916 D., p. 269.

In the note at page 275 the following rule is laid down and the following authorities cited in support thereof:

"In the event of a bill of indictment being ignored or not found, an order of the court is necessary for its re-submission to the grand jury."

COM. vs. SARGENT, Thac. Crim. Cas.(Mass.) 116;

PEOPLE vs. CLEMENTS, 5 N. Y. Crim. 288;

PEOPLE vs. NEIDHART, 71 N. Y. Supp. 591;

PEOPLE vs. DILLON, 197 N. Y. 254, 18 Ann. Cas. 552, 90 N. E. 820, **reversing** 128 App. Div. 926;

ROWAND vs. COM. 82 Pa., 405;

COM. vs. ALLEN, 14 Pa. Co. Ct., 546;

COM. vs. PRIESTLY, 24 Pa. Co. Ct., 543;

COM. vs. WHITAKER, 25 Pa. Co. Ct., 42;

COM. vs. CHARTERS, 20 Pa. Supr. Ct. 599;

See also—

STATE vs. COLLINS, 73 Ia. 542, 35 N.W.625;
SUTTON vs. COM., 97 KY. 308, 30 S. W. 661;
PEOPLE vs. WARREN, 109 N. Y., 615, 15 N. E. 880;
REA vs. STATE, 3 OKLA., CRIM. 269, 105 PAC. 381;
STATE vs. REINHART, 38 Pac. 822.

It is stated at page 37 of the brief for the Government, that it is settled by the common law that a charge may be resubmitted to a subsequent grand jury after it has been ignored by a previous one.

As hereinbefore stated, we concede this principle, but deny that an ignored charge may be resubmitted to the same or a subsequent grand jury by a prosecuting officer on his own initiative and without the knowledge or approval of the proper court.

As we understand the cases cited by the learned counsel for the Government, none of them sustain the proposition for which they contend.

At page 47 of the Government's brief it is stated, in discussing the Pennsylvania cases, that in the case of Commonwealth vs. Snyder, 13 Pa. Dist. Repts., 27, "it was clearly held that a charge of larceny could be resubmitted without leave of court, notwithstanding Rowand vs. Commonwealth."

We find it necessary to take sharp issue with this misrepresentation of the decision in the Snyder case. As we read this case there is nothing in it that in any way supports the contention of the Government in the case at bar, nor justifies the further statement, at page 48 of their brief that "it thus seems that even in Pennsylvania there is a right to resubmit a new bill (as in the case at bar) without leave of court."

In order that your Honorable Court may be ad-

vised of the full scope of the decision in the Snyder case, we quote the opinion of the court in full:

"LANDIS, J., June 27, 1903.—On Nov. 20, 1902, an indictment, numbered No. 62, November Sessions, 1902, was presented before the grand jury, wherein the defendant was charged with having, on Oct. 8, 1902, committed the larceny of a bag of corn and rye chop of the value of $2, of the goods and chattels, etc., of Isaac B. Brubaker. The indictment was returned ignored, and Isaac B. Brubaker was ordered to pay the costs. To the above number of January Sessions, 1903, and, on another complaint, a second indictment charged that the defendant on or about Oct. 8, 1902, was guilty of the larceny of a lot of chop feed of the value of $2 the property of Isaac B. Brubaker. The latter indictment was, without leave of court, submitted to the grand jury on Jan. 22, 1903, which returned a true bill. It is now contended that the second complaint and indictment was for the same offence as that contained in the indictment which was ignored by the former grand jury, and that no special leave having been granted for its presentment, it should be quashed.

"In Rowand v. Com., 82 Pa., 405, it was held that when a defendant has been once discharged on a return of 'ignoramus,' a new bill sent up without a fresh hearing and without the leave of court, should be promptly quashed, in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need. And it is also stated in Wharton's Criminal Pleading and Practice, section 373, page 260, that 'in England, if the grand jury at the assizes or sessions has ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions; and if such other bill is sent before them, it has been said that they should take no notice of it. But a bill may be sent up, if the emergency require, after an 'ignoramus,' at the discretion of the court.' But in section 446, page 301, of the

same work, it is also said by the text writer that 'If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted, though the sending up of a second bill after an 'ignoramus,' is an extreme act of prerogative, subject to the revision of the court.' And in Com. v. Sheppard, 20 Pa. Superior Ct. 417, Rice, P. J., says: 'In such cases, that is, where the indict- is sent up by the district attorney without first obtaining the leave of the court, the discretion of the court may be invoked, and is exercisable upon a motion to quash. If the court refuses to quash, this, ordinarily, is equivalent to giving its sanction. If the court sustains the motion to quash, this is tantamount to refusing its approval of the action of the district attorney. In either case the action of the court is not reviewable on appeal, except for manifest and flagrant abuse of discretion.' In Com. v. Miller, 2 Ashamead, 61, it is also said. 'The pleas in bar, in these cases, suppose that because the bills of indictment presented to the grand jury, against the defendants, for the original and principal offences, have been returned 'ignoramus,' that the prosecutions are ended; that the imprisonments were without any reasonable or probable cause; that the proceedings are tantamount to an acquittal; and that, therefore, the imprisonment was not warranted. This position receives a decisive answer in the consideration, that a return of 'ignoramus' is by no means an acquittal of an offence; nor does it conclude anything whatever. Another bill may be sent to another grand jury; it may be found true, and the party convicted and have judgment for the original felony.'

"There seems to me to be quite a distinction between the sending of a bill based upon the same complaint the second time to the same grand jury after it has been ignored by them, and an original prosecution for the same offence returned to an-

other grand jury at another session. In the first instance, the complaint is dead, unless the court sees fit to revive it by permitting the case to be again sent to the same or a subsequent grand jury. In the latter case the prosecutor makes a new complaint, and the case comes again into the court to be passed upon, the prosecutor being liable, however to answer in an action for malicious prosecution in case it is ascertained that he acted maliciously and without probable cause in making the second complaint. I can find no authority which decides that another complaint cannot be instituted before a justice and returned to another sessions; and by what means a court is to ascertain from a mere inspection of the record that the complaint thus made is for the same offence as that which was formerly presented, I am unable to see. Take, for instance, the present case. There is no evidence before us to show that the offences are the same. And even if, perchance, they be, it must be presumed merely because two offences of a similar character are charged in both indictments, and the same day of the month and year is set forth as the time at which each was committed. This would seem to be a sufficient reason for refusing the motion to quash, but I prefer to put the case upon the broader grounds, that the court has no right to quash an indictment brought under such circumstances upon a new complaint for any such reason. At the same time I would adhere strictly to the rule, whenever a case arises, that a bill once ignored cannot be sent to the same grand jury or a subsequent one, without leave. As I do not think that the defendant is entitled to be thus discharged, the motion is dismissed.

"Motion to quash dismissed."

Again, the case of UNITED STATES vs. MARTIN, 50 Fed., 918, partially quoted by counsel for the Government at page 49 of their brief, is not authority for the proposition that a United States Attorney may,

without the supervision of the court, resubmit ignored charges to the same or a subsequent grand jury.

To the language quoted in the Government's brief the court, in its opinion in the Martin case, added the following quotation from Wharton's Criminal Pleading and Practice, section 446:

> **"If a man be committed for a crime and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted, though the sending up of a second bill, after an ignoramus, is an extreme act of prerogative, subject to the revision of the court."**

It, therefore, clearly appears from this case, that the resubmitting of an ignored bill to the same or a subsequent grand jury is a matter of extreme prerogative and always subject to the control of the court.

In the Martin case the refusal of the court to quash the second indictment was tantamount to the approval by the court, in the exercise of its discretion, of the resubmission of the ignored bill to a subsequent grand jury, and the case is, therefore, authority only for the proposition that the ignoring of a bill is not necessarily a termination of the prosecution and that an ignored bill may, with leave of the proper court, be resubmitted—a proposition which we have conceded throughout this case.

Likewise the case of HALE vs. HENKEL, 201 U. S. 43, (referred to at page 53 of the Government's brief, and upon which counsel for the Government say they place their main reliance) is no authority for the proposition that charges once ignored by a grand jury may be resubmitted to the same or a subsequent grand jury, without proper cause shown and leave of court had thereon.

The major fact in that case was the legality of a

subpoena duces tecum directed to Hale commanding him to appear before the grand jury to testify and to produce certain papers, etc., generally described. Hale refused to testify, save generally, and to produce the papers,—challenging the right of the grand jury to conduct the inquiry before it and also alleging his answers might tend to incriminate him.

The grand jury reported the matter to the court, and made a presentment that Hale was in contempt. Upon the parties appearing before the circuit judge, he was directed to answer the questions and produce the papers. Hale, persisting in his refusal, was held in contempt and was committed. Upon a hearing on a writ of habeas corpus, before another judge of the same court, the writ was discharged and the prisoner remanded.

Upon this state of facts it was that the matter came into the Supreme Court of the United States, where the action of the circuit court was affirmed.

Certainly, always the facts upon which a judicial decision is based must be borne in mind, when attention is directed to that decision, and an attempt is made to apply such decision to another set of facts. What relation do the facts in the decided case bear to the facts under consideration? What relation or similarity is there between the facts of the Hale vs. Henkel case and the case at bar? None. The rights, duties and prerogatives of a grand jury, as raised by and pertaining to the facts in the Hale case, are clearly stated in the opinion of the court, yet, neither directly nor indirectly, is there anything therein contained authorizing the resubmission of charges, once ignored, to the same or a subsequent grand jury, without leave of court upon proper cause shown.

Bearing in mind that the action of the Circuit Court in the HALE vs. HENKEL case was affirmed, we

quote from that opinion—WALLACE, Circuit Judge—as reported in 139 Fed. Rep., 496:

> "* * * The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court. The court can at any time direct the grand jury to consider a particular accusation, or to investigate a supposed violation of the criminal law; and whether it does this by direct instructions or by directing the prosecuting officer to present the matter for the consideration of the grand jury is of no consequence. If, in the absence of such instructions, the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene, and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and, though it is erronous, it is not void or illegal, and cannot be reviewed by habeas corpus. Of course this is not true in cases where the court transcends its authority."
>
> " * * * When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the documents, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceedings mentioned in the presentment."

Further, in support of the proposition that the action of the court below in quashing the Erie indictment was in strict accord with the practice of the Pennsylvania Courts, we cite the case of COMMONWEALTH vs. GREEN, 126 Pa. St., 531.

The facts of the case, as appears by the opinion of the court below, were as follows:

The grand jury made a presentment charging the

defendant with certain violations of law. The district attorney, **by leave of court,** sent before the grand jury a bill of indictment based upon the presentment and a true bill was returned.

When the case was called for trial, the defendant moved to quash the indictment, for the reason, inter alia, that it was not based on a presentment by the grand jury made from the personal knowledge or observation of its members, or upon the testimony of witnesses sent before them by the court.

Upon the hearing of this motion, it developed that the information upon which the presentment was made came to the knowledge of the grand jury during the investigation of an indictment against a third party, the grand jury thus learning for the first time of the alleged offence of the defendant. Following the cue thus received, the grand jury of their own motion, **without authority from or even the knowledge of the court,** called witnesses before themselves, and upon the information thus gained they made their presentment.

The indictment was quashed, **notwithstanding** leave of court given to present the same to the grand jury. The Supreme Court affirmed the action of the lower court.

MR. JUSTICE CLARK in delivering the opinion of the Supreme Court, after a discussion of the ordinary and several extraordinary methods of instituting criminal proceedings said:

> "The presentment therefore, as a basis for the indictment, was wholly insufficient, for the reason, that it was not found by the grand jury, upon their own knowledge and observation.
>
> It has been suggested, however, that if the presentment of the grand jury was not authorized by law, it may be treated as a mere suggestion, by which the attention of the court was called to the

commission of the crime, and that the District Attorney having, with leave of the court, sent up an indictment, the proceeding may be sustained under the other exceptions to the usual mode of criminal procedure, already specified." (Namely, 1, where criminal courts, of their own motion, called the attention of the grand juries to and directed investigation. 2, Where the Attorney General, ex officio, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused).

" * * * It is plain that the exigency of this case did not require, or even appear to require this extraordinary exercise of power, on the part of the District Attorney. There was no emergency, no demand of haste, no effort to escape, not even any appearance of escape; there was no public good to be subserved, indeed there was absolutely nothing to call for this unusual method of procedure, and it is not pretended there was. It is true that in this case the indictment was prepared and sent to the grand jury 'with leave of the court,' but the court upon being informed that the presentment was not made upon the knowledge and observation of the grand jury, and was therefore no presentment at all, had a right to revoke that leave, and to quash the bill, which was done."

"* * * The sending of the bill to the grand jury was undoubtedly right as the matter then stood, and the order quashing the bill was certainly right when the facts appeared. If the court in the exercise of its discretion had sustained this indictment, and brought the defendant to trial and conviction upon it, it is quite improbable that this court on a writ of error would have disturbed the judgment; it is only for a flagrant abuse of this discretion, as we have said, this court would interfere. But the same court which in the exercise of its discretion directed the indictment to be sent to the grand jury, upon being informed as to the illegality of the presentment, in the exercise of the same discretion, afterwards quashed the

bill. We think that discretion was properly exercised, * * *."

Again, the rule of law in this connection is clearly stated in the case entitled, IN THE MATTER OF THE MEMORIAL OF THE CITIZENS ASSOCIATION, 8 Phila. Rpts., 478.

This memorial called the attention of the court to the maintenance of alleged grievous public nuisances by the several Passenger Railway Companies and prayed the court to present the subject to the consideration of the grand jury, with instructions to inquire into the same, etc.

This the court refused to do for the reason that it would be an unwarranted departure from the well established rules of law regulating the commencement of criminal prosecutions.

Judge PAXSON, afterwards Chief Justice of the Supreme Court of Pennsylvania, filed the opinion of the court, wherein it is stated:

> "As a general principle, any departure from the well established rules of law regulating the commencement of criminal prosecutions is to be avoided. We do not pursue the beaten path merely because it is such, but for the reason that experience has demonstrated that course to be the safer one. It is better for the commonwealth, and safer for the citizen. * * *
>
> "We do not mean to intimate that emergencies may not arise in which the court may not upon its motion, as was said by Judge King in his able charge to the grand jury in 1845, 'call the attention of grand juries to and direct the investigation of matters of general public import, which from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions rather bears on things than persons, the object being the suppression of general and public evils, affecting in their

influence and operation communities rather than individuals, and, therefore, more properly the subject of general than special complaint, such as great riots, that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances, affecting the public health and comfort; multiplied and flagrant vices, tending to debauch and corrupt the public morals, and the like. In such cases the courts may publicly, in aid of inquiries directed by them, summon, swear and send before the grand jury, such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offense and offenders. But this course is never adopted in cases of ordinary crime, charged against individuals, because it would involve, to a certain extent, the expression of an opinion by anticipation of facts subsequently to come before the court for final judgment, **and because such cases present none of those urgent necessities** which authorize a departure from the ordinary course of justice.' * * *'"

"I have quoted this paragraph at length from the charge referred to, because it embodies what may be regarded as well established law."

Summarizing his conclusions, Judge Paxson said:

"1. While a power resides in the Court to give in charge to the grand jury matters of serious public import, such as affect the public peace, or the existence of great nuisances, yet this power, which is a most delicate one, is never exercised unless under urgent necessity, or when, from the peculiar circumstances of the case, the public interest would suffer from the delays incident to the ordinary forms of law.

2. The exercise of this power rests in the sound discretion of the Court; and when adequate legal remedies exist by staute, by ordinance, or by indictment at common law, the Court will not generally move until these remedies, or some of them, have been invoked.

3. The Court in the exercise of this power in the exceptional cases above stated will direct it against offences, rather than against individuals or corporations. It is for the grand jury, after inquiry, to make presentment of the individuals or corporations connected with, or guilty of, the commission of the alleged offence; whereupon it may become the duty of the District Attorney, as the public prosecutor, to send up bills of indictment against either individuals or corporations."

It sems worthy of note that about the same time Judge Paxson cited and approved the above quoted remarks of Judge King, as set forth in an opinion filed by Judge King, reported in 3 Clark (Pa.) 188, Mr. Justice Field, of the Supreme Court of the United States, likewise quoted at length from the same opinion, in his charge to a Federal grand jury in California—see 2 Sawy. 667, 30 Fed. Cases 993, Case No. 18255.

In concluding this section of our argument, we repeat that the real issue in this case does not relate to the powers or prerogatives of the grand jury, but rather to the illegality of the procedure adopted by the United States Attorney and his specially appointed assistant, associated with him in re-submitting to the Erie grand jury, without the knowledge, approval or consent of the court, the indentical charges against the defendant, and no more, which had been ignored by the Pittsburgh grand jury.

By their action in this matter, the representatives of the Government absolutely ignored the court and transgressed the rights of the defendant which they were in duty bound to protect. They seemed to think that the court had no control over the manner in which the investigation of criminal charges could be instituted before the grand jury at the instance of the Government, nor over the exercise of the functions of the representatives of the Government in instituting crimi-

nal prosecutions. It would seem that they were under the impression that whenever, in their opinion, a citizen should be indicted, they are at liberty to call witnesses against him before a grand jury, and, if that grand jury does not agree with them and ignores their charges, that they may then re-submit the same charges to a subsequent grand jury, recalling the same witnesses, and keep on re-submitting their charges to successive grand juries until they succeed in finding one that will agree with them and do this without the knowledge, consent or approval of the court.

Manifestly this case does not turn upon the question of the powers of the grand jury, but upon the right of a United States Attorney and an assistant to him, specially appointed by the Attorney General, to re-submit to a subsequent grand jury, without the knowledge or consent of the court, a bill of indictment which had been ignored by a previous grand jury.

III.

DEFENDANT IN ERROR IN NO WAY, BY APPLICATIONS FOR CONTINUANCES OR OTHERWISE, WAIVED HIS RIGHT TO MOVE TO QUASH THE INDICTMENT AND TO HAVE HIS MOTION SUSTAINED BY THE COURT.

It seems to be suggested by the learned counsel for the Government that the defendant in error by making applications to the court for the continuance of the trial of the cases, in order that he might have time to prepare his defense to the numerous charges contained in the indictments, waived some right. It is not, and could not be, contended that the defendant in error in any of his petitions for continuances agreed that a motion to quash would not be filed at the proper

time, or set forth in any of said applications any statements to warrant such an inference.

It is perfectly clear that the running of the statute of limitations cannot in any way affect the legal right of the defendant to question the legality of the procedure out of which the Erie indictment arose.

It is equally clear that any difficulty in which the Government now finds itself with reference to the indictment in question is entirely due to the action of the United States attorney and his assistant in persisting in an illegal and unwarranted method of procedure even after their attention had been directed by the court to the irregularity and illegality of the manner in which they had proceeded.

At the time the Erie grand jury made its presentment there was ample time for the institution of a prosecution in a legal way and in keeping with the suggestion of the court.

An information could have been made against the defendant, as was done in the case of Commonwealth vs. Snyder, supra, cited by the Government, or the invalid indictment could have been nolle prossed and application made to the court for leave to resubmit the charges ignored by the Pittsburgh grand jury to the grand jury then sitting at Erie.

But as stated by the court in its written opinion (Record p. 97) "no steps were taken on behalf of the Government to correct the error pointed out by the court at the time the indictment was received."

The court further says in said written opinion, (Record p. 97) that "the representatives of the Government at that time should have presented a petition and laid the grounds, if any, for an order of the court permitting the re-submission of the matters to the grand jury, but no steps were taken by the Govern-

ment in any way to remove the doubt with respect to the validity of the second indictment."

Instead of doing any of these things, the representatives of the Government, despite the warning of the court, elected to stand upon the procedure which they had adopted without the permission or even the knowledge of the court, and to stand upon the indictment, the validity of which had been questioned by the court.

Having thus elected to pursue a course of conduct which was in derogation of the substantial rights of the defendant and subversive of well established principles of criminal procedure, and which had been condemned by the court, we respectfully submit that the Government should not now be heard to complain.

IV.

DEFENDANT'S MOTION TO QUASH WAS NOT A SPECIAL PLEA IN BAR.

At page 53 of the Government's brief it is declared that the judgment of the court below sustained a special plea in bar. This particular phase of the matter before the court is discussed at length in the brief of defendant in error, filed with his motion to dismiss the writ of error, and to which brief, in addition to what we here offer, we respectfully refer the court, in support of our position that defendant's motion to quash was not a special plea in bar.

We are and have been quite in accord with the admission of counsel for the government, as set forth on pages 53 and 54 of their brief under subdivisions (a), (b) and (c). These admissions eliminate much from consideration, that otherwise might be regarded as requiring notice.

The conclusion arrived at by counsel for the Government, under subdivision (d), page 55 of their brief, to wit, "The judgment of the court therefore was in effect that no indictment for these particular offenses could ever be submitted against Thompson in that district" is based upon a false premise, or, at least a premise that did not include all the facts. It omits important and material circumstances in connection with and occuring before and at the time the indictment was received or returned into court, and which differentiates the case at bar from the ordinary case in which, by allowing or refusing a motion to quash, the court, of course, grants or refuses, approves or disapproves, **nunc pro tunc**, the introduction of the matter before the grand jury.

The **warning** sounded by the court at the time the presentment was made and the **reservation** by the court at the time the indictment was received are material facts to be considered, to wit,

> "This presentment presented by the grand jury is received by the court. The court has grave doubts as to whether an indictment founded thereon is valid. It would be invalid for this reason: A similar presentment was made by the last grand jury in this district and they were authorized to present a bill embracing the matters which appear in this presentment. The court authorized them to bring in a bill in accordance with their presentment.
>
> "This matter is again brought to this subsequent grand jury without the knowledge or the permission of the court, and the court is of the opinion that there should have been an application to this court for a re-submission of this matter to a new grand jury, or that some action of the court should have been taken in regard thereto. However, inasmuch as the great weight of your duties in this regard has been done and inasmuch as you have made this presentment, the court will

> permit you to bring in a bill of indictment in accordance with the presentment, **the court reserving,** however, **the legal question** as to **whether or not the indictment so brought in should be and remain a true bill against the defendant."**

Still another very material and important matter, (as it seems to counsel for the defendant in error), omitted by counsel for the government from the premise upon which their said conclusion is based, is the fact that from March, 1916, the date of the **return** of the indictment in question, till May 1918, when the motion to quash was made, the representatives of the government took no steps to correct the error into which they had fallen,—notwithstanding the fair and timely warning of the court in this particular.

Wherefore, the present situation is due entirely to the method of procedure elected to be followed by the representatives of the Government, in that,

(a) After the investigation before the Pittsburgh grand jury, February, 1916, and the detailed knowledge thus acquired,—the United States attorney had ample information to proceed by the usual and ordinary method of beginning criminal prosecutions,—**or** he could, **upon showing proper cause** therefor, have secured the permission of the Court to **re-submit** said **charges to the Erie grand jury.**

(b) **Upon being warned** by the Court that **grave doubt** was entertained as to the validity of an indictment based upon the Erie presentment, the United States attorney could have **discontinued or nolle prossed** said indictment and begun a new prosecution under the usual and legal method of instituting criminal prosecutions.

(c) The court, having accepted said indictment, **but expressly reserving the question of its legality,**

the United States attorney could **and should** have asked leave to nolle pros. and begun a new proceedings in a legal manner.

(d) Or, the United States attorney could have required defendant **to plead** to said indictment, **at any of the times a** continuance of trial was had on petition of defendant,—**all** of which times were **within** the statutory period.

We agree with the assertion, at top of page 56 of the government's brief, that defendant's motion to quash sets up a rule of substantive law, but deny that it barred any and all other prosecution of Thompson on these particular charges, and thus, in effect, became a special plea in bar.

We likewise challenge the soundness of the concluding statement of counsel for the government under this division of their brief, (page 57), namely, "The motion to quash in the case at bar * * * constitutes a reason why the defendant could not be tried at all for the offenses charged. It was therefor a special plea in bar within the meaning of the Act of March 2, 1907, c. 2564."

In other words, the contention is, that because the indictment in question has been held void by reason of the illegal manner in which it was secured, and the statute of limitations has run, the motion to quash this particular indictment, against which, and only against which, this motion is good, became thereby a special plea in bar,—good against all subsequent indictments.

The all sufficient answer to these several allegations is, that if, upon the quashing of the indictment in question, another indictment had been found under a legal method of procedure, and the same motion to quash had been preferred against it, this latter indict-

ment would have stood for all time, so far as this motion to quash is concerned. The fact that the defendant **might** have pleaded the running of the statute as a special plea in bar thereto, does not, and cannot, make the motion to quash a special plea in bar. It did not, and could not, uproot the cause of action; it only struck down the particular indictment against which it was filed—and therefore, despite the ingenious argument of counsel for the government, it is not a special plea in bar. It is not a special plea in bar, measured by the standard laid down in United States vs. Barber, 219 U. S., 72, cited in the Government's brief at page 53, and therein adopted as the test to be applied to defendant's motion to quash.

V.

THE ORDER OF THE COURT BELOW QUASHING THE INDICTMENT WAS AN EXERCISE OF PROPER JUDICIAL DISCRETION, CLEARLY WITHIN THE LIMITS OF THE COURT'S AUTHORITY, AND CONSEQUENTLY, CANNOT BE REVIEWED OR CONTROLLED BY WRITS OF MANDAMUS AND PROHIBITION.

We have submitted our view of this question in a separate brief filed to the No. where the Government presents its Motion for leave to file petition for writs of mandamus and prohibition, and therefore, respectfully refer the court to that brief for our discussion of the question, and only submit here our position, namely:

1. If the order of the District Court, quashing said indictment, "was without any warrant of law and in excess of its lawful jurisdiction," as claimed by counsel for Petitioner, **then**, although the motion of

the defendant in error (at No. 250 October Term, 1919, of this Court) to dismiss the writ of error should prevail, because the judgment complained of does not come within the provisions of the Act of March 2, 1907, the writs of mandamus and prohibition should nevertheless be allowed.

2. **But** if the order or judgment of the court below in quashing the indictment was **not extra-judicial**, and although said defendant's motion to dismiss the writ of error should prevail for want of jurisdiction, and **even though** this court might question the soundness of the said order or judgment in quashing said indictment, **yet**, the alternative writs of mandamus and prohibition should not be allowed, because to be of avail to the Petitioner, they would have to be made absolute or peremptory, and that would be to substitute the judgment of this court for the judgment of the court below in a matter wherein it is without jurisdiction so to do.

VI.

IN CONCLUSION it is submitted that the method of procedure pursued by the United States Attorney in securing this indictment is contrary to all recognized rules of practice in instituting criminal actions; that no exigency required, or seemed to require departure upon the part of the government from the "beaten path," of which pathway it was said in the MEMORIAL OF CITIZENS ASSOCIATION, 8 Phila., (Pa.) 478:

> "We do not pursue the beaten path merely because it is such, but for the reason that experience has demonstrated that course to be the safer one. It is better for the Commonwealth and safer for the citizen.

> While a power resides in the court to give in charge matters of serious public import, such as affect the public peace, or the existence of great nuisances, yet this power, which is a most delicate one, is never exercised unless under urgent necessity, or when from the peculiar circumstances of the case, the public interest would suffer from the delays incident to the ordinary forms of law."

And likewise, if it be suggested that the government might better have proceeded by the usual and ordinary method of instituting criminal prosecutions, **and yet,** at the same time be claimed, that notwithstanding the failures so to do, there is absence of any showing of actual prejudice or injury to the defendant in this case, and that therefore, defendant's motion to quash should have been denied as raising minor matters with which the law does not concern itself, it is further submitted that such a proposition is wholly without merit, and must fail in the light of serious consideration,—because instances might be multiplied wherein departure from recognized rules or precedent **might seem** to produce **no present** injury to any one. It might be, and often is a good reason for refusal to prosecute, or refusal to punish, **but it is no reason** for **justifying illegality.**

The inconvenience, if you please, to the government of having failed to proceed as required by law, in the case at bar, is but temporary, while the injustice of denying the defendant investigation pursuant to the law of the land would be perpetual to him, and might work most vexatious complications in the method of procedure hereafter.

As was said by MR. JUSTICE BREWER, in the case of HALE vs. HENKEL, 201 U. S., 43, quoting the words of MR. JUSTICE BRADLEY in BOYD vs. THE UNITED STATES, 116 U. S., 616.

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon."

Finally we say, an approved illegality is always raught with gravest danger, and always to be guardd against, by reason of the consequences that may nsue.

Respectfully submitted,

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W. C. McKEAN,
Attorneys for Defendant in Error.

OPINION

UNITED STATES *v.* THOMPSON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 250. Argued January 27, 28, 1920.—Decided March 1, 1920.

A judgment of the District Court sustaining a so-called motion to quash, which in effect bars the United States from further prosecuting the alleged offense under the same or any other indictment, depriving the district attorney and the grand jury of their lawful powers over the subject, is subject to review by this court under the Criminal Appeals Act as a "judgment sustaining a special plea in bar." P. 412.

The grand jury has power to inquire into and indict upon a charge which has previously been examined and ignored by another grand jury; the United States attorney has power to invoke such a re-examination; and the exercise of these powers is not subject to be denied at the discretion of the District Court. P. 413.

Hence, a judgment quashing an indictment because the United States attorney did not obtain permission from the court to make the re-

submission to the grand jury upon which the indictment was obtained is erroneous, as invading the functions of the United States attorney and those of the grand jury. P. 413.

The rule governing this subject is general, based on the common law and the decisions of this court, and is not subject to the decisions or statutes of the State in which the offense is committed and prosecuted. P. 415.

Section 722 of the Revised Statutes, in the criminal cases to which it relates, adopts the state practice only in the absence of a federal rule governing the matter in question. *Id.*

Applications for writs of mandamus and prohibition to control the District Court are disallowed when the relief sought is afforded through a writ of error. P. 417.

Reversed.

THE case is stated in the opinion.

Mr. W. C. Herron, with whom *The Solicitor General* and *Mr. Assistant Attorney General Stewart* were on the brief, for the United States.

Mr. J. E. B. Cunningham, with whom *Mr. R. M. Gibson* and *Mr. W. C. McKean* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Comptroller of the Currency, in January, 1915, closed the doors of the First National Bank of Uniontown, Pennsylvania. At the opening of the November term, 1915, of the court below, sitting at Pittsburgh, the attention of the grand jury was called by the court to alleged criminal acts connected with the administration of the affairs of the bank, and, following an investigation, the district attorney submitted to the grand jury a proposed indictment charging Thompson, the president of the bank, in forty-seven counts with violations of the Na-

tional Bank Act. The grand jury having concluded to indict only for the first seventeen of said counts, the district attorney prepared an indictment embracing them and withdrew the other thirty from consideration. The bill thus drawn was submitted to the grand jury, by it presented as a true bill, and was ordered filed.

On March 17, 1916, the Attorney General of the United States, pursuant to the Act of June 30, 1906, c. 3935, 34 Stat. 816, appointed a special assistant for the purpose of coöperating with the district attorney in the matter of the steps to be taken to procure the indictment of Thompson. The next session of the court was held in March, 1916, at Erie, and the district attorney and the assistant to the Attorney General, without asking authority of the court, directed the attention of the grand jury to the charges against Thompson covered by the counts as to which the grand jury at Pittsburgh had failed to make a presentment, and, after hearing witnesses called by the district attorney, the Erie grand jury, on the 24th day of March, found a true bill containing thirty counts covering such charges. When this indictment was presented the court expressed doubt, in view of the fact that the charges had been submitted to a previous grand jury and no presentment had been made, whether there was any authority in the Erie grand jury, at the instance of the district attorney, to consider such charges without previously obtaining the consent of the court. However, the court observed that, as the grand jury had reported a true bill, it would be placed on file, with the reservation of a right to take such future action regarding it as might be deemed appropriate.

Both indictments went upon the calendar for hearing, but that result was postponed from time to time in order to afford the accused an opportunity to prepare his defense. Finally in May, 1918, when both indictments were set for trial, a motion was made to quash both, based, as

far as concerned the Erie indictment, upon the ground that the grand jury had considered the subject of that indictment, not of its own motion, but upon the suggestion of the district attorney without any previous authority given him by the court. The motion was further supported by the assertion that the presentment of a true bill by the Erie grand jury was not made "from the personal knowledge of any of the grand jurors, nor from the testimony of witnesses sent before the said grand jury by leave of, or by order of the court"; that "the knowledge upon which said presentment was so made, came to said grand jury 'through the evidence of certain witnesses' called before said grand jury by the United States attorney without the order or permission of the court and the subject matter of said presentment was not called to the attention of, or given in charge or submitted to, the grand jury by the court." In addition, the motion averred that the thirty counts included in the Erie indictment covered the same offenses which were embraced by the thirty counts as to which the Pittsburgh grand jury had failed to find a true bill, and that the witnesses introduced by the district attorney at Erie were virtually the same witnesses previously by him introduced as to the same charges before the Pittsburgh grand jury.

The motion as to the Pittsburgh indictment was rejected and we put it out of view. That as to the Erie indictment was granted on the ground that the district attorney had no authority, after the action of the Pittsburgh grand jury, to resubmit the same matters to the Erie grand jury without the approval of the court, and that the Erie grand jury, for the same reason, had no authority to consider the subject. The court said:

"The resubmission of those matters to the later grand jury at the Erie term was without the knowledge or approval of the court. The resubmission of the offenses against the Government to a new grand jury is a matter of

highest prerogative, and is always subject to the control of the court, and, in proper cases, always granted by the court. . . . Again, it appears . . . that there was a special designation by the Attorney General, of some one, to attend the sessions of the grand jury at Erie and proceed with the investigation.

"We have, then, a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant. . . .

"I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and, therefore, I must sustain the motion to quash the indictment found at Erie, and note an exception to the Government.

"The court further wishes to state that the control of the grand jury by common law and by statute law is under the court and the proceedings are under the control of the court.

"MR. RUSH [the district attorney]. May it please the court, the holding, then, of the court, as I understand it, is that the presentation of the case to the grand jury, which has been formerly ignored, would be a bar to a subsequent presentation, unless leave of court were granted.

"BY THE COURT. Without the permission of the court, yes. I think that is the law, and that is what I have stated."

A rehearing was asked on the ground, among others, that if the allowance of the motion to quash were adhered to, the result would be to bar the right of the Government to further prosecute for the offenses charged, as in consequence of the continuances which had been granted and the delay in making the motion to quash, the statute of

limitations would be operative. The rehearing was denied, the court reiterating its previous rulings and pointing out that, as the Pittsburgh indictment had not been quashed, there was opportunity for the Government to prosecute for the offenses therein charged, although its right to further prosecute the offenses charged in the Erie indictment would be lost.

This direct writ of error was then prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, both parties agreeing, for the purposes of a motion to dismiss for want of jurisdiction, which we now consider, that under the circumstances here disclosed the authority to review must depend upon whether the quashing of the indictment was a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

As it is settled that this question is to be determined, not by form but by substance (*United States* v. *Barber*, 219 U. S. 72, 78; *United States* v. *Oppenheimer*, 242 U. S. 85), it follows that the fact that the ruling took the form of granting a motion to quash is negligible. Testing, then, the existence of jurisdiction by the substantial operation of the judgment, and assuming for the purpose of that test that the United States possessed the right to submit the indictment to the second grand jury without leave of court, which right was denied by the judgment below, we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based; and (b) because a like consequence resulted as to the authority of the district attorney and the powers of the grand jury, since the exercise in

both cases of lawful authority was barred by the application of unauthorized judicial discretion.

It is true it is argued that, as the rights which the United States asserted were not possessed, the judgment did not bar the United States or the district attorney or the grand jury from the exercise of any lawful power. But this can only rest upon the assumption, that as there was no error in the judgment there is no power to review it, which, if its premise has any force, will be disposed of by the decision of the merits to which we now proceed.

The Government urges that in the absence of statute of the United States giving such authority, the want of power in the court to quash the indictment for the reasons by it stated is clearly established by the following propositions, which in an elaborate argument it is insisted are made certain by a consideration of the common law, of the statutory law of the United States, of the practices from the beginning, and of the adjudications of this court which settle the question. The propositions are these:

(1) That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.

(2) That the United States district attorney, in virtue of his official duty and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token the duty of the district attorney to direct the attention of a

grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.

We do not stop to review or even cite the extensive array of authorities from which the Government deduces these propositions, but content ourselves with referring to the following cases and the authorities therein cited by which the propositions are sustained. *Hale* v. *Henkel*, 201 U. S. 43, 59–66; *Blair* v. *United States*, 250 U. S. 273; and see, with particular reference to the second proposition, *Weeks* v. *United States*, 216 Fed. Rep. 292, 297, 298; *Creekmore* v. *United States*, 237 Fed. Rep. 743; *Abbott Bros. Co.* v. *United States*, 242 Fed. Rep. 751; *Kelly* v. *United States*, 250 Fed. Rep. 947. To do more than to make this reference is unnecessary as in argument the abstract correctness of the propositions advanced by the Government is conceded and the only controversy is as to their application, based upon the insistence that the present case is governed by an exception which exacts the necessity of procuring the prior approval of the court wherever a district attorney presents to one grand jury charges which a previous grand jury has ignored. The existence of this particular exception was expressly declared by the court below to be the basis for its decision. But we think the ruling, although it rested upon the assumption stated, cannot be sustained, since the assumed exception is so incompatible with the general principles governing the subject as to cause it to be, in substance, not an exception at all, but, under the guise of an exception, a mere disregard or repudiation of the principles themselves, for the following reasons: In the first place, because, while admitting the power of the grand jury, it yet denies such power, since it limits the right of that body to inquire by causing it to be unlawful for it to listen, without the approval of the court, to a suggestion of the district attorney under the circumstances stated, and

therefore causes any finding made to depend upon an inquiry as to the particular source of information which led to the investigation from which the finding resulted. In the second place, because, while conceding that the power of the grand jury is continuous, so that unfavorable action does not exhaust the authority of that or of another grand jury to examine, it limits or restrains thereafter the power of both to do so. In the third place, because, while the general rule which is stated establishes the authority of the district attorney as official prosecutor, and makes it, as we have seen, coterminous with the right of the grand jury to consider, the exception subjects that authority to the exercise of a judicial discretion, which, as well illustrated by the case under consideration, destroys it. In the fourth place, because, comprehensively considering the subject, the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

From the point of view of authority, the argument seeks to establish the existence of the exception upheld by the court below by a reference to a number of cases decided in Pennsylvania and in other States.[1] As to the Pennsylvania cases, they undoubtedly support the existence of the exception, not in virtue of any statutory provision to

[1] *Rowand* v. *Commonwealth*, 82 Pa. St. 405; *Commonwealth* v. *Stoner*, 70 Pa. Super. Ct. 365; *Commonwealth* v. *Allen*, 14 Pa. Co. Ct. 546; *Commonwealth* v. *Whitaker*, 25 Pa. Co. Ct. 42; *Commonwealth* v. *Priestly*, 24 Pa. Co. Ct. 543; *People* v. *Neidhart*, 71 N. Y. S. 591; *People* v. *Clements*, 5 N. Y. Crim. 288; *People* v. *Dillon*, 197 N. Y. 254; *State* v. *Collis*, 73 Ia. 542; *Sutton* v. *Commonwealth*, 97 Ky. 308; *People* v. *Warren*, 109 N. Y. 615; *Rea* v. *State*, 3 Okla. Crim. 269.

that effect, but solely in contemplation of the common law of the State. But, in view of what we have just said concerning the error upon which the exception rests, its departure from the common law, its conflict with the settled rule applicable in the courts of the United States, as sustained by the decisions of this court, we are unable to accept the doctrine of the Pennsylvania cases as being even persuasively controlling.

As to the cases from other States which are relied upon as sustaining the exception, they are inapplicable because, with one or two exceptions, they rest exclusively upon the provisions of state statutes which on their face show an intention to deviate from the general rule which otherwise would prevail at the common law.[1]

It remains only to consider the contention that, irrespective of the want of persuasive power of the Pennsylvania cases, as the case in hand concerns the prosecution for a crime committed in Pennsylvania, even though it be a crime against the United States, the state rule, in virtue of the provisions of § 722 of the Revised Statutes of the United States, was authoritatively controlling on the court below and is so controlling here. But the section relied upon provides for applying a state rule only where that course is required by an absence of federal rule on the subject. In view of the existence of a controlling federal rule which would be overthrown by applying the state law, the want of merit in the contention is so self-evident that we leave it without further notice.

The difference between calling into play a discretion for the purpose of prohibiting the performance of duties authorized by law, lest if their performance be permitted, they may be abused, and the exertion of a sound discre-

[1] *People* v. *Warren*, 109 N. Y. 615; *People* v. *Dillon*, 197 N. Y. 254; *Sutton* v. *Commonwealth*, 97 Ky. 308; *State* v. *Collis*, 73 Iowa, 542; *Rea* v. *State*, 3 Okla. Crim. 281.

tion possessed, for the purpose of reasonably regulating the performance of duties by law imposed, serves, in the last analysis, to dispose of the arguments concerning the dangers of abuse of power which may result from a failure to uphold the existence of the discretion which the court below deemed it possessed and upon which its action was based.

As we have exercised jurisdiction to review on the writ of error, the prayer of the United States for the granting of a rule to show cause why mandamus and prohibition should not issue if jurisdiction of the writ of error was not maintained, has nothing now to rest upon and it is denied. It further follows from what we have said on the merits that the judgment below must be and it is

Reversed and the cause remanded for further proceedings in conformity with this opinion.